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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 DEPARTMENT 324 HON. VICTORIA G. CHANEY, JUDGE
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6 FREDRIC RELLER,)
7 Plaintiff(s),)
8 vs.) Case No. BC261796
9 PHILIP MORRIS INCORPORATED,)
a corporation, et al.,)
10 Defendant(s).)
11
12 REPORTER'S DAILY TRANSCRIPT OF TRIAL PROCEEDINGS
13 WEDNESDAY, JULY 23, 2003
14 (PAGES 10183 THROUGH 10297, INCLUSIVE)
15 A.M. SESSION
16
17
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OFFICIAL REPORTER
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I N D E X

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3 WEDNESDAY, JULY 23, 2003
4 8:35 A.M. 10183
10:34 A.M. 10240
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6 CLOSING ARGUMENT BY MR. PIUZE (RESUMED) 10186
7 CLOSING ARGUMENT BY MS. WILKINSON 10199
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1 CASE NUMBER: BC261796
2 CASE NAME: RELLER vs. PHILIP MORRIS
3 LOS ANGELES, CA WEDNESDAY, JULY 23, 2003
4 DEPARTMENT 324 HON. VICTORIA G. CHANEY, JUDGE
5 TIME: 8:35 A.M.
6 REPORTER: TIMOTHY J. MCCOY, CSR NO. 4745
7 APPEARANCES: (AS HERETOFORE NOTED)

* * *

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10 (The proceedings commenced in open court,
11 in the presence of the jury, as follows:)

12
13 THE COURTROOM ASSISTANT: Everyone rise, please,
14 and face the flag.

15 In the presence of the flag of the United
16 States, emblem of the Constitution and of freedom and
17 justice for all, Department 324 of the Superior Court of
18 the State of California, for the County of Los Angeles,
19 is now in session. The Honorable Victoria Chaney, Judge,
20 presiding.

21 Please be seated and come to order.

22 THE COURT: All right. Back in the matter of Reller
23 versus Philip Morris, BC261796.

24 The record should reflect that all 12 jurors
25 and the four alternates are present. Mr. Piuze is here for
26 the plaintiff; Mr. Gardner, Ms. Wilkinson, Ms. Matthews,
27 Mr. Allulis are, Dr. Lewis is present.

28 Before we begin, folks, there is a couple of

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1 things I want to do. First, the temperature yesterday, we
2 had a lot of people in here. Was it okay for you folks?
3 A little cold? Well, the problem is, it's hard to adjust
4 the temperatures in these courtrooms, so I apologize. I
5 think I'd rather have it chilly than hot. Okay. That's
6 number one, then.

7 Number two, I want to go over a couple of
8 things with you so that there is no confusion. First, I
9 want to go over the instruction for preponderance of the
10 evidence and the instruction for clear and convincing
11 evidence, just so that you understand the difference.

12 "Preponderance of the evidence" means
13 evidence that has more convincing force than
14 that opposed to it. If the evidence is so
15 evenly balanced that you are unable to say
16 that the evidence on either side of an issue
17 preponderates, your finding on that issue
18 must be against the party who had the burden
19 of proving it.

20 "You should consider all evidence bearing
21 upon every issue regardless of who produced it.

22 "Clear and convincing evidence" means
23 evidence of such convincing force that it
24 demonstrates, in contrast to the opposing

25 evidence, a high probability of truth of the
26 facts for which it is offered as proof. Such
27 evidence requires a higher standard of proof
28 than proof by a preponderance of the evidence.

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1 "You should consider all of the evidence
2 bearing upon every issue regardless of who
3 produced it.

4 "During the trial certain evidence was
5 admitted for a limited purpose. Do not consider
6 it for any other purpose. Your attention was
7 called to these matters when the evidence was
8 admitted."

9 Now, there were several times when that
10 happened, but there's a couple of things I want to remind
11 you of; that is, first, the newspaper and magazine articles.
12 Those may not be used for what we call in legal terms the
13 truth of the matter asserted, in other words, that the
14 articles and the content of the articles is true. They can
15 only be used to have an understanding of what was out in
16 the general community in Los Angeles and Florida. I don't
17 remember where else, but anyway, at the time that Mr. Reller
18 was living here. It goes to the issue of reliance.

19 That's one thing. And the other one -- I'm
20 having a case of brain freeze right now.

21 MS. WILKINSON: The 1994 testimony?

22 THE COURT: Thank you. That was it.

23 MS. WILKINSON: The Congressional.

24 THE COURT: Thank you.

25 The other thing is, in the instructions
26 somewhere I read you about an immunity period in California
27 from 1988 through 1997, and there was testimony from
28 Congress that was shown to you that was from 1994. That,

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1 again, was to go to the issue of reliance, not to the --
2 you may not use that to establish liability against Philip
3 Morris. It goes for other reasons.

4 Do you all understand that?

5 JURY RESPONSE: Yes.

6 THE COURT: Everybody is saying yes and nodding their
7 heads at me. Okay. I just want to make sure there was no
8 confusion.

9 And any evidence other than those two things
10 that I had given you instructions about during the trial
11 that limited the evidence, you're to follow my instructions
12 at the time that I gave it during the trial.

13 All right. Mr. Piuze?

14 MR. PIUZE: Thanks.

15

16 CLOSING ARGUMENT BY MR. PIUZE (RESUMED)

17

18 MR. PIUZE: As far as that time line behind me
19 is concerned, Mr. Campbell is up there in white, sort
20 of on this removable, for the reason that the judge just
21 said, because this particular evidence right here, this
22 has to do with Mr. Reller's reliance. This has to do with
23 statements he heard. But no liability can attach for this.
24 And that's why this is a peel-off.

25 Four years later, Mr. Bible said the following.

26 1998, Minnesota:

27 "How many would have to die from smoking
28 before you would reassess your duties? One?"

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1 100? 5,000? How many, sir?
2 "Answer: Well, I don't know that anybody
3 does, so I'm finding that a very hard assumption
4 to make.
5 "Question: I didn't ask you that yet.
6 We'll get to that.
7 "Answer: Okay.
8 "Question: How many would have to die
9 from your products before you'd reassess your
10 duties?
11 "Answer: I would have thought, if you're
12 forcing me to say that somebody, I'd have to assume
13 somebody died. If one person died, I would reassess
14 my duties.
15 "Question: So if one person died from smoking,
16 you would reassess your duties; is that correct?
17 "Answer: I would reassess my duties. I would
18 look at all my duties, yes.
19 "Question: Would you shut down the business
20 if one person died?
21 "Answer: Well, yes. Well, that question
22 has actually been asked me before publicly in
23 a deposition, and I had said at that time that
24 perhaps I would, because I would like to talk
25 with the government about the matter because
26 of the wide implications it would have.
27 "I subsequently concluded that probably that
28 wouldn't be a very effective thing to do because

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1 there's quite a large supply of cigarettes in the
2 supply line and that wouldn't have any impact, just
3 closing down the plant for a short period of time.

4 "I frankly believe that most people in America,
5 perhaps in the world even, believe that cigarettes
6 are a risky product, and I believe that most people
7 in America, most smokers, most people, and, in fact,
8 most people in the world, recognize that cigarettes
9 are a risk factor, can cause damage, and I don't know
10 if it became -- if people became aware, if there
11 were some scientific proof that cigarettes were to
12 kill people, that in fact the government would ban
13 the product.

14 "I think one of the first things I would do
15 would be to talk to the government to determine
16 whether they, the federal government, or the state
17 government, together, would like to ban the product.

18 "If they did, of course, I'd shut -- I'd
19 shut the plant.

20 "Question: Are you done?

21 "Answer: Yes, I'm finished.

22 "Question: All right. Well, now see if
23 you can answer my question.

24 "If one person died as a result of your
25 products, would you shut the business down?

26 "Answer: No. I just explained what I
27 would do.

28 "Question: You would not. Okay.

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1 "Now, did you state under oath in August
2 of 1997 that you would shut the business down?"
3 Excuse me. I read that wrong.
4 "Now, you did state under oath in August of
5 1997 that you would shut the business down, didn't

6 you?

7 "Answer: Yes. And I just explained that
8 I subsequently reflected on that, and I felt that
9 would not have much effect."

10 So anyway, this was read verbatim in this trial
11 from the Minnesota trial transcript. Now, Mr. Campbell
12 is gone; Mr. Campbell has been pulled off of that chart;
13 Mr. Campbell's words aren't actionable. Mr. Campbell's
14 words were only up there to show you what was out there
15 for the public to hear, which was, continue denials from
16 the highest levels of the company.

17 But after taking Mr. Campbell off of that
18 chart, Mr. Bible remains. It is beyond -- I can't conceive
19 of anyone, anyone, saying that Mr. Bible truly believed
20 that not one person had ever died from smoking.

21 MS. WILKINSON: Your Honor?

22 THE COURT: Mr. Piuze, the word "I" and what you
23 believe and can conceive of is not appropriate.

24 MR. PIUZE: I apologize.

25 THE COURT: And if you keep on doing, I will start
26 sanctioning you and I'll keep track of it, and outside the
27 presence of the jury I will deal with it.

28 MR. PIUZE: Okay.

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1 THE COURT: Stop it.

2 MR. PIUZE: Plaintiff's lawyer is sorry for saying
3 that.

4 It is inconceivable that anyone can tell
5 you that the CEO of Philip Morris wasn't perjuring himself
6 in 1998 when the CEO of Philip Morris said: I don't
7 believe one person has ever died from smoking. And it
8 is inconceivable that he meant that he would shut down
9 the factory if one person died from smoking, because that
10 is the same lie that was told back here (indicating).

11 Now, 47 years of lies, there's only one purpose
12 for the lies: to keep people smoking. There's only one
13 purpose to keep people smoking: to keep making money. In
14 order to make that money, the collateral damage was only
15 human life. Including Mr. Reller's.

16 I just wanted to -- excuse me. On behalf
17 of the plaintiff, here are just a few more thoughts about
18 testimony from Neal Benowitz and Michael Cummings having
19 to do with the difficulty in quitting smoking.

20 Dr. Benowitz is a grant reviewer for the V.A.
21 Hospitals. Dr. Benowitz is one of the persons that decides
22 on what the practitioners at the V.A. Hospitals do in
23 smoking cessation. Dr. Benowitz says (reading):

24 Nicotine releases dopamine, serotonin,
25 and hormones in the brain. Feel-good hormones.
26 For a heavy smoker, when the smoking stops and
27 the nicotine stops, a hormone deficiency is
28 created. This causes people to be lethargic,

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1 anxious, irritable, having trouble sleeping,
2 concentrating, they cannot focus, they feel
3 depressed, life is not enjoyable. This goes
4 on for months.

5 He agrees with this: That addiction affects
6 free choice; someone who is addicted enough has a very,
7 very difficult time making a free choice. Addiction
8 undermines free choice.

9 Anyone can stop smoking. Anyone can stop
10 smoking in a structured environment. The question becomes:

11 Can one lead a normal life in the real world on the outside
12 after stopping smoking?

13 And the answer is: Very, very difficult,
14 but obviously doable. Anyone can stop smoking, but
15 it is extremely difficult for some people to do so.

16 From both Dr. Benowitz and Cummings: The
17 amount smoked, and when a person has the first cigarette
18 of the day, is a strong predictor of heavy dependence.
19 The reason for that is the heavier levels of nicotine
20 required in the body to maintain what the person needs,
21 the tougher it is to stop.

22 When someone wakes up first thing in the
23 morning, those levels of course are lower, and so when
24 someone, upon putting their feet down on the floor, has
25 as an urge the first thing to go have a cigarette, that
is a predictor of heavy dependence and very difficult
27 quitting. So is two packs a day.

28 This research -- I'm sorry. These conclusions
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1 are based on at least a dozen U.S. Government-funded
2 research studies. Heavy smokers lag behind the general
3 population by 10 to 20 percent in their awareness of health
4 risks. In order to stop, people must know of the risks and
5 relationships between smoking and disease. And Mr. Reller
6 did. He knew what was claimed. And people must believe
7 the relationship between health and smoking, and Mr. Reller
8 didn't believe.

9 By creating doubt purposely, by creating
10 doubt about the health risks of smoking -- not plaintiff's
11 attorney's words -- by creating doubt about the health risks
12 of smoking in Mr. Reller and millions of other people, it
13 made it much, much more difficult for them to quit.

14 And as Dr. Burns said in the little snippet I
15 read yesterday, as a public health official: Philip Morris
16 individually and the bodies which it belonged to, the TIRC,
17 the CTR, the TI, made the public health officials' jobs
18 much, much more difficult in getting people to believe
19 the health risks, and in getting people to quit smoking.

20 Anyway, it's plaintiff's burden to prove how
21 much damages there are, and in this case the damages, the
22 prove-up of the damages is by what the judge just read:
23 preponderance of the evidence.

24 It falls into two categories, you've got
25 two jury instructions. One is for what's called economic
damages, and there's a stipulation to that amount, and
27 that's the beginning and the end of it. It's \$309,000
28 and change.

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1 The second is for what's called general
2 damages. Human damages. Damages to compensate the person.
3 Not for out-of-pocket loss, but for other losses. Sometimes
4 it's called pain, suffering, emotional distress, loss of
5 enjoyment of life. The words are on the jury instruction,
6 but they're words. That's all they are is words.

7 The 12 of you are in a better position than me
8 to figure out what the proper compensation for Mr. Reller's
9 past non-economic damages are. I guess it's probably hard
10 not just for 12 of you, but for everyone sitting on this
11 side of the jury box to figure out what it must be like
12 to be told, as Mr. Reller was told at County USC Hospital:
13 You ain't going to leave. Get your affairs in order.

14 And it must be impossible, or really, really
15 hard, to imagine what it's like to get one's mental affairs

16 in order: those grandkids that were going to be one of
17 the focuses of later life; the golden years that some of
18 us hear about after working hard for a long, long time,
19 and obviously Mr. Reller did that, to relax a little bit
20 and enjoy one's self a little bit; to think about what
21 it's like to end a relationship with someone you really
22 love, and I think we've been able to see Mr. and Mrs. Reller
23 have a special bond and that he's really fond of her; he
24 broke down, or started to break down, only twice in all
25 of those deposition times, and in both of those cases it
26 had to do with his wife and leaving her behind alone.

27 Anyway, I'm going to -- excuse me. Plaintiff's
28 attorney here is going to cross his fingers for Mr. Reller,
10194

1 and for the purposes of this particular argument right now
2 I'm just going to ask you to assume he just lives out the
3 year. Dr. Qasabian said maybe that will happen. I hope
4 Dr. Qasabian's wrong and he lives out this year and next
5 year and the year after. But for a reasonable medical
6 probability -- and once again, that's what we're dealing
7 with here, probabilities, what's more likely than not --
8 that won't happen.

9 And so the question becomes: What is the
10 proper compensation for Mr. Reller for the last three
11 years of what he's been through. And there's a little
12 subquestion in there, too: For how many times has he
13 kicked himself in the pants for having a part, which he
14 admits, in what's come about him. How many times has
15 he kicked himself in the pants for trusting, and should
16 that be part of the general damages compensation package?

17 His faith and what he was brought up to
18 believe, that people tell you the truth, that people
19 who run major corporations are honorable people, and when
20 someone looks you in the eye and makes you a promise, that
21 they mean it, that's how he was brought up, that's all gone,
22 he doesn't believe that anymore. And maybe, you know, maybe
23 that's a little demerit to him because it took him so long
24 to figure out that ain't necessarily the way it is anymore.

25 In addition, there should be compensation for
26 the loss of life expectancy. Someone who is Mr. Reller's
27 age, a man nowadays has 16.8 years of life expectancy, and
28 the jury instruction that contains that language says this
10195

1 isn't conclusive, some people live longer, some people live
2 shorter, and you should check out all of the evidence to
3 decide what the story is here.

4 Well, what the evidence is here is that in
5 Mr. Reller's family, people live longer, longer. A lot
6 longer. And 15 or 20 or however many years ago, having a
7 grandparent live to 102, I mean, a hundred and two is pretty
8 darn old nowadays, I think. But then? That was really
9 something. And having his mom alive and kicking and well
10 now at 93, that's pretty good. And as we all know, each
11 generation lives longer, not shorter, for the most part,
12 here in this country.

13 So, his life expectancy is at least -- this
14 is the plaintiff's attorney talking now, if 16.8 was the
15 average, this case is way beyond the average.

16 Mr. Reller never asked Philip Morris for a
17 discount when he plucked down his money for those Marlboros
18 from '64 to '72, he paid full pop for every pack he ever
19 bought; and Mr. Reller never asked Philip Morris for a
20 discount when he bought Benson & Hedges from 1972, almost

21 to the year 2001, he paid full pop for every single package
22 he ever bought. Philip Morris didn't offer a discount,
23 Mr. Reller didn't ask for a discount. Mr. Reller paid full
24 price. Philip Morris should pay full price.

25 What's 16.8 years of life expectancy worth?
26 What's one year of life worth? I don't -- excuse me. As
27 the plaintiff's attorney, I can't tell you. The 12 of you
28 know better than any one of plaintiff's attorney. But some
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1 observations can be made. In trying to save a year of a
2 person's life, we read in the papers all the time about the
3 tremendous efforts medical science goes to. Tremendously
4 expensive.

5 Now, yesterday it was said by me that in
6 this country we should love life first, liberty second,
7 property only third, and it's demonstrated that not everyone
8 believes that, but it's restated now from the plaintiff's
9 perspective: life first, property last.

10 On behalf of Mr. Reller, I say a million
11 dollars a year. Full pop. Let Philip Morris pay full
12 price for the loss of a year's life. And if it's 16.8
13 years, let Philip Morris pay full price. And if it's
14 longer, let Philip Morris pay full price. No discounts.
15 Mr. Reller never asked for a discount, Philip Morris
16 shouldn't ask for a discount.

17 I'm not going to tug at anybody's heartstrings.
18 Mr. Reller's tragedy is something that the 12 of you can
19 discuss when you're deliberating this case. We've got
20 people on this jury at various ages, some real close to
21 Mr. Reller, some on the way, some are thinking about being
22 in his position, meaning, not dying of lung cancer, but
23 being about ready to start enjoying the fruits of a lifetime
24 of labor, taking it easy. Some are already there. So, you
25 folks are a lot better off than me, and I rely on you and I
trust you --

27 THE COURT: Mr. Piuze?
28 MR. PIUZE: Excuse me. Excuse me.
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1 You folks are a lot better off than plaintiff's
2 attorney, who relies on you, and trusts you to come to a
3 fair decision.

4 This is the last thing I want to -- excuse me.
5 This is the last issue to be covered: Fredric Reller is a
6 microcosm and a symbol, and a very, very, very small symbol
7 at that, of the damage created by Philip Morris.

8 MS. WILKINSON: Your Honor?
9 THE COURT: Mr. Piuze, are you going to punitive
10 damages? That sure sounds like where you're going.
11 MR. PIUZE: No, your Honor. Well, up to 262, yes.
12 Right up to there, yes. Right up to there.

13 THE COURT: 262?
14 MR. PIUZE: Burden of proof -- puni -- yes, right
15 exactly to there, which is part of this phase of the trial.

16 THE COURT: Mr. Piuze, the issue right now is
17 compensatory damages. There is an issue of malice,
18 oppression, fraud. But microcosms are not where we're at
19 right now. We are not talking about anything other than
20 Mr. Reller.

21 Campbell vs. State Farm, Mr. Piuze?
22 MR. PIUZE: Okay. Got it. Got it.
23 The jury will be asked to make a determination
24 during this phase of the case about whether Philip Morris
25 acted with malice, oppression, or fraud. Because of the

26 implications of the jury's finding on this issue, the jury
27 must find malice, oppression or fraud by what's called clear
28 and convincing evidence, which was just read this morning.
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1 Because of the implications of a finding of malice,
2 oppression and fraud, the burden of proof is higher than
3 for compensatory damages.

4 The evidence in this case of malice, oppression
5 and fraud is inescapable. One of the -- I could open up the
6 jury instructions and read them, but 12 people are going to
7 have them in the jury room, and you can read them, but one
8 of the tests is: A conscious disregard for the rights and
9 safety or rights and health, one or the other, of others.
10 And there is 47 years of a conscious disregard for the
11 rights and safety and health of others.

12 Another test uses words such as vile,
13 contemptible, loathsome; to be looked down upon by decent
14 people.

15 That's the blueprint right there (indicating).
16 No decent person in the world could look back on what's
17 occurred and be anything other than appalled.

18 Money for life on the most basic scale.

19 Anyway, that would be oppression.

20 A finding of fraud, I believe there's four
21 separate jury instructions having to do with fraud. What
22 it comes down to? Lying, cheating and stealing.

23 Anyway, it's very important not just to have
24 proper compensation for Mr. Reller, it's very important
25 to have a finding of malice, oppression and fraud.

26 A woman named Margaret Mead, a famous
27 anthropologist, once said: "Never doubt that a small group
28 of thoughtful citizens can change the world. Indeed, it

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1 is the only thing that ever has."

2 And so, you small group of thoughtful citizens,
3 thank you very much for listening. On behalf of Mr. Reller,
4 Mrs. Reller, and their attorney, thank you for listening.

5 THE COURT: Thank you.

6 All right. We're going to have a change of
7 scenery here as Ms. Wilkinson gets up. I'm sure that the
8 charts are coming down.

9 MS. WILKINSON: Actually, your Honor, I'm going to
10 use those for a minute, and then I'd ask for a short break.
11

12 (Pause in proceedings)

14 MS. WILKINSON: May I proceed your Honor?

15 THE COURT: Of course.

17 CLOSING ARGUMENT BY MS. WILKINSON

18

19 MS. WILKINSON: Here's the good news: I'm not going
20 to talk as long as Mr. Piuze. He spoke for almost four --
21 five hours, but that's because he had a lot to say on behalf
22 of his client, and as I said at the very beginning, he's a
23 very good lawyer, he tells a great story.

24 But here when you're done, when we're done
25 talking to you and you go back into that jury room, you're
26 not going to be deciding what the story is, you're going
27 to be deciding on the evidence and whether he proved by a
28 preponderance of the evidence that every single element of
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1 every single claim was proved by the plaintiff; does the

2 evidence comport with the instructions that her Honor
3 has given you. Not whether he can tell a good story,
4 not whether he can inflame your passions about big, huge
5 corporations are titans and all those words that he used
6 to kind of suggest to you that he's going up against this
7 giant corporation. But you're going to go back there and
8 follow the instructions, as I know you will, because you
9 told us from the very beginning that you would, that's why
10 you were chosen, and you're going to follow the instructions
11 that are some of the most important instructions -- this
12 chart, I'll read them -- that her Honor read to you right
13 at the beginning: "You must not be influenced by sympathy,
14 prejudice or passion."

15 And remember that instruction Mr. Piuze started
16 talking to you about in jury selection about individuals
17 versus corporations, could you treat them the same, and
18 personal responsibility? Well, her Honor corrected I think
19 both of us, as she has from time to time throughout the
20 trial, and said she would give the law on the matter.

21 Well, here's what the law says on that:

22 "Do not discriminate between a corporation
23 and natural individuals. Each is a person in the
24 eyes of the law, and are entitled to the same fair
25 and impartial consideration and to justice by the
26 same legal standards."

27 In other words, Philip Morris, through
28 Dr. Lewis and all the other people who work there, are to
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1 be treated like people just like Mr. Reller, and not to be
2 treated with prejudice or passion because they're a large,
3 huge corporation, or because they work for a large, huge
4 corporation.

5 When we listened yesterday to Mr. Piuze, he
6 told his story, and I took some notes about some of the
7 things he said versus what I -- excuse me, what the evidence
8 has shown. And I want to point some of those things out
9 so that when you go back and you decide what the evidence
10 is and how it comports with the law, you rely on your own
11 recollections.

12 Her Honor gave you that instruction that
13 what we say isn't evidence for a very good reason: We
14 don't always have a perfect recollection, and we might have
15 a little bias about what we think about what evidence came
16 in in front of you.

17 You heard Mr. Piuze talk about quitting and
18 Dr. Benowitz and precontemplation, and he said: Oh, you
19 know, I never heard that word "precontemplation" before.
20 But I'll accept it from Dr. Sreenivasan.

21 Well, you know what? That word came up with
22 Dr. Benowitz, his own world-renowned expert, and, of course,
23 Dr. Benowitz knows that theory because it's very well
24 accepted in the mental health community. And he said in
25 response to my questions, I asked him:

26 "And you believe that the most important
27 thing when it comes to quitting is motivation?
28 He answered: "Well, yes. This is critical.

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1 "And nobody who's experienced and well
2 regarded in the field, like you, disagrees with
3 you in this field; right?
4 "I don't think so.
5 "Everybody talks about motivation.
6 "Yes.

7 "And when you talk about motivation or
8 when some people who write and study in this
9 area talk about motivation, they talk about
10 whether people are ready to quit; right?
11 Whether they're in that phase?

12 "Yes.

13 "There's something called precontemplation
14 that some people describe," I asked him.

15 "Yes.

16 "Tell the jury what precontemplation is."

17 Dr. Benowitz said:

18 "Well, the readiness to quit smoking has
19 been classified in different stages. So, there
20 is the precontemplation, which means you're
21 not even thinking about quitting; there's the
22 contemplation stage, when you're thinking about
23 it but you haven't made up your mind; there's a
24 pre-quitting stage, when you made up your mind
25 but haven't really started yet; and then there's
26 the quitting stage when you're actively trying."

27 So, Dr. Benowitz was well aware of this
28 theory because he works in the public health community, but
10203

1 the reason it matters is not because there's a different
2 recollection of who mentioned it first or who talked about
3 it, but because it matters of what was in Mr. Reller's mind,
4 what would have made him try to quit. Because the story you
5 heard for the last five hours is: Mr. Reller couldn't quit;
6 he was either too addicted or he didn't believe there were
7 any dangers associated with smoking.

8 The evidence shows something quite different.
9 I asked Dr. Benowitz whether he agreed that Mr. Reller had
10 been warned way back in 1964 when the Surgeon General told
11 everybody that smoking caused lung cancer in men, and no
12 dispute in this courtroom that Mr. Reller heard about
13 the Surgeon General's report in 1964, and here's what
14 Dr. Benowitz said. I asked him:

15 "So that even though he had been warned,"
16 speaking of Mr. Reller, "he wasn't motivated to
17 quit from 1962 to 1972; right? There's no dispute
18 about that."

19 Dr. Benowitz responded: "Correct."

20 Dr. Benowitz agrees that Mr. Reller was warned
21 in 1964 when he heard about the Surgeon General's report,
22 and that that didn't motivate him to quit. He didn't care.
23 He was in that precontemplation phase. In fact, he didn't
24 try and quit, other than two instances you heard from both
25 Dr. Benowitz and Dr. Sreenivasan when his wife asked him to
26 quit and when he believed that cigarettes were personally
27 affecting him. The marinara incident.

28 But then this morning Mr. Piuze suggested to
10204

1 you: Well, you know what? You really need to know about
2 all of the dangers to really be able to quit.

3 Dr. Cummings came in and testified, and I had
4 some issues with some of his testimony, but he talked about
5 smoking cessation, and we asked him whether if anyone -- if
6 people knew all the potential dangers of smoking, whether
7 that would predict whether someone would quit or not.
8 Because he said he goes out of his way, which he should,
9 of course, at his clinic, to tell people about the dangers
10 of smoking, and still the quit rates are very, very low.

11 And I asked him: "So awareness of the

12 dangers of smoking is not a predictor of whether
13 people are going to quit or not, is it?

14 "That's right," he answered.

15 Because it's not whether people are aware,
16 it's whether they want to quit, whether they're motivated.
17 But the story that we heard was that things
18 that Philip Morris or the Tobacco Institute or others said
19 are what affected Mr. Reller's decision.

20 So, I want to use Mr. Piuze's chart and test
21 that theory against the evidence.

22 Here's what his chart says; right? "Creating
23 doubt about the health charge without actually denying it."

24 And he listed for you what he said is the
25 evidence that shows that Mr. Reller is entitled to damages
26 in this case.

27 And I've tested this tape, and I'm going
28 to test it again, because what I'm going to do -- yep,
10205

1 it doesn't hurt the chart, your Honor, just so everyone
2 knows. So I'm going to go through these and see which one
3 of these, if there's any evidence that Mr. Reller heard, saw
4 or relied on any of these statements, because her Honor read
5 you the instructions, and Mr. Reller cannot prevail in this
6 case if he didn't hear or see or rely on anything Philip
7 Morris said. Those are essential elements in every single
8 claim, other than product defect, which I'll talk about
9 in a minute.

10 So, let's start with the Dr. Doll study. No
11 evidence Mr. Reller heard anything about that. He answered
12 questions saying from 1950 to 1964 he didn't hear anything
13 about the dangers of smoking. So he didn't hear about this,
14 didn't hear about these studies.

15 And then we have the Frank Statement. We
16 have heard about this Frank Statement for the entire trial,
17 from beginning to end, about promises that the tobacco
18 industry made. We also heard Dr. Doll say that when Philip
19 Morris and the others said they didn't believe the products
20 they make were injurious to their health, that that was a
21 reasonable statement to make at the time in 1954 because
22 the issues were still in dispute.

23 But in this case it doesn't matter because
24 there is no evidence that Mr. Reller, when he was 15 years
25 old, ever heard, saw, or read about the Frank Statement. It
26 was published once in 1954. He never heard it, he never saw
27 it.

28 What's the next thing up here? Philip Morris's
10206

1 reaction to the Surgeon General. He read you from the
2 memorandum, remember, that Mr. Weissman wrote right after
3 the Surgeon General's report? "We must in the near future
4 provide some answers which give smokers a psychological
5 crutch and a self-rationale to continue smoking."

6 Well, that was an internal memo; right?

7 Written by Philip Morris, Mr. Weissman, to another
8 executive. No evidence that Mr. Reller heard any of that,
9 ever saw it, that it was even humanly possible for him to
10 do so at that time.

11 Now, in this tiny place right here, Mr. Piuze
12 has put the Surgeon General's report. We all agree there's
13 no dispute in this case, Mr. Reller did hear about that.
14 He admits, and, in fact, he says that he heard about the
15 Surgeon General's report and that's what made him switch.
16 That's why he changed cigarettes.

17 So that we won't cover up. I'll cover up this
18 Frank Statement, because he never heard about that.

19 Now, what's in big print up here so that nobody
20 can miss it? Is: Creating doubt, the Roper Proposal,
21 written in 1972 by somebody who worked inside of the Tobacco
22 Institute to somebody else who worked at TI. An internal
23 memo. Absolutely no evidence in this record that Mr. Reller
24 heard or saw that memo from Mr. Kornegay, I think is who
25 wrote it.

26 And in 1972, what is the evidence? The
27 evidence is that around that time Mr. Reller had the
28 incident with marinara sauce, the one time we can all
10207

1 point to there was no doubt in his mind about the dangers
2 of smoking, because when he thought he was vomiting blood,
3 he immediately associated being sick with smoking.

4 So in 1972 when that Roper Proposal was being
5 written, it surely wasn't creating any doubt in Mr. Reller's
6 mind, because, without any prompting from anybody else, he
7 stopped smoking because he thought smoking was literally
8 making him sick.

9 Tobacco Institute, 1979: "The continuing
10 controversy. Scientists have not proven that cigarette
11 smoking causes human disease." Submitted to Congress,
12 which her Honor already told you is protected activity,
13 lobbying Congress, and marked as a press release.

14 No evidence in this case that Mr. Reller saw
15 that. You didn't see a piece of -- Mr. Piuze didn't play
16 for you a clip that Mr. Reller might have seen. Nothing.
17 Nowhere in this record is there evidence that Mr. Reller
18 saw that.

19 And the same for the 1984 Tobacco Institute
20 submission. Nothing in the record showing Mr. Reller saw,
21 heard, or read it, directly or indirectly, which is what
22 the law requires.

23 1971, CBS Face The Nation, Joseph Cullman.
24 Remember how many questions Mr. Reller was asked about
25 whether he saw or heard a particular newspaper or magazine?
26 He told us that he had read The Wall Street Journal, that
27 he had, you know, read newspapers infrequently on occasion.
28 But never -- when we asked him whether he had seen a
10208

1 specific article about the dangers of smoking, because, as
2 Dr. Schaller told us, they have been inundated, we have been
3 inundated by this since 1964 at least, with articles about
4 the dangers of smoking and health, and Mr. Reller said he
5 never saw it; he never had any idea what the American Cancer
6 Society's position was, never had any idea what the American
7 Lung Association's position was on smoking.

8 He isn't saying in this case that he wants you
9 to believe he weighed the evidence and somehow believed the
10 tobacco companies over the government or over non-profits.
11 His position in this case is: He heard and saw nothing
12 from the public health community or the government. Until
13 November of 2000, he had no idea that there was even a
14 possibility that smoking could cause cancer.

15 So the story may be: Oh, he believed, you
16 know, big business over government. But that's not his
17 testimony. His testimony is: I didn't hear anything the
18 government said; I didn't hear anything the American Cancer
19 Society said; I didn't have any idea that when Beverly Hills
20 was banning smoking in restaurants it had anything to do
21 with health; yes, I saw the warnings, and his wife came in

22 and told us she showed him the warnings. But his claim is:
23 I had no idea there was even a possibility that smoking
24 could cause lung cancer.

25 The CBS Face The Nation, we didn't see that
26 clip, we didn't hear Mr. Reller say that he had seen
27 Mr. Cullman on TV.

28 Okay. What's left? Well, we took down the
10209

1 1994 testimony, and, of course, Mr. Piuze took that down
2 for two reasons. Not just because you can't use it to hold
3 Philip Morris liable, meaning, Mr. Reller can't use it to
4 say it's an element to prove any of his claims, because it's
5 during at that immunity time period, but also the reason
6 this came down is because the only testimony in the record
7 about this is that he didn't believe it.

8 So, as to reliance, this shows exactly what
9 we've been arguing all along: Mr. Reller didn't believe big
10 executives. Mrs. Reller came in the courtroom and told you,
11 and I'll show you the quote later on, that they both watched
12 this testimony, and neither of them believed the CEOs,
13 because they knew nicotine was addictive. They responded
14 the way the rest of America did. Many of you probably
15 remember this, and it was probably the low point for the
16 tobacco industry. No one believed them that nicotine wasn't
17 addictive. They were arguing over the definition.
18 Dr. Domino told you about it, and Dr. Sreenivasan told you
19 dependence is what people in the mental health community
20 use.

21 But that point was lost in his testimony.
22 What everybody thought was that they were being disingenuous
23 when they said nicotine wasn't addictive. And Mr. Reller
24 agreed with that. He didn't believe executives over the
25 government. He and Mrs. Reller didn't believe the
executives.

27 Now, what's the last thing Mr. Piuze has up
28 here? He has some testimony by Mr. Bible. Well, I'm pretty
10210

1 sure there was no evidence in the record that Mr. Reller
2 attended the trial in Minnesota or that he read anything
3 about it or heard anything about Mr. Bible's statements.
4 This is being introduced to you for only one reason: To
5 infuriate you about Mr. Bible's testimony in 1998. It has
6 nothing to do with Mr. Reller. He didn't hear it, he didn't
7 see it, and there's no testimony in the record that he knew
8 anything about it.

9 So when we look at what the evidence shows,
10 versus the story, there's only one thing up there -- I
11 don't know about the website, it was in 2000. According to
12 Mr. Piuze, there's a website that I'll show you from Philip
13 Morris that started in 1999. I don't believe that there's
14 any testimony --

15 THE COURT: Ah, ah, ah. Don't you do it either.

16 MS. WILKINSON: I'm sorry. There's no testimony
17 in the record about Mr. Reller seeing the Philip Morris
18 website, so I should cover that up as well.

19 So, what are we left with? From 1950, when
20 Mr. Reller was -- he was born in '39, so in '50 he was 11
21 years old, until 2000 -- this is a great chart -- there's
22 only one thing that Mr. Reller saw and heard and relied
23 on; right? He told you he relied on that (indicating).
24 That's why he switched to filtered cigarettes: Because
25 of the Surgeon General's report.

26 Mr. Reller was warned in 1964 by the Surgeon

27 General, and, as he said, he never changed his position
28 after that. 30 -- how many years is that? 36 years. He
10211

1 smoked, he switched to his wife's brand, but same thing:
2 never tried a low tar cigarette, never looked for any of
3 the other cigarettes on the market that -- remember in
4 advertising they showed the tar and nicotine delivery?

5 If you were really concerned about tar and
6 you wanted to reduce tar, you saw in those advertisements
7 in the '70s, they showed the tar and nicotine content? He
8 could have seen the Cambridge cigarette advertisements, it
9 was out on the market, that Philip Morris produced for six
10 years. It was advertised as .1. He never picked up that
11 cigarette. As Mr. Piuze said, that reduced tar by a great
12 amount.

13 Dr. Kassman told you it didn't taste so great,
14 it tasted like he was sucking in air, because it did reduce
15 so much tar. But the point is, if he was concerned about
16 tar, there were other things out on the market for him.

17 If he was concerned at all after 1964, as he
18 said, because he thought that tar was bad for him, there
19 was lots of alternatives. He didn't choose to pursue any
20 of those. He decided he wasn't going to quit, he was going
21 to switch, and that's the position he kept, despite the
22 first warning label that's here in small print in 1966,
23 despite the second warning in 1969, and despite the third
24 warning label in 1985.

25 So those were the things that Mr. Reller heard
26 and saw and relied on.

27 Now, during this trial we have talked about
28 some very serious things, and we've had a few laughs,
10212

1 sometimes even at her Honor's expense about Diet Cokes, but
2 the truth is, this is a very serious case and these are
3 important issues.

4 And Mr. Reller, before he filed this lawsuit,
5 told us what he thought about these lawsuits. Remember
6 Mr. Mudry who came in, his close business associate, was
7 brought in under subpoena, knew Mr. Reller for the last
8 nine or ten years, he worked with him, socialized with him,
9 even visited him in the hospital. Knew him better than
10 anyone who came into the courtroom, other than Mrs. Reller.
11 Nobody else. They could have brought in other people.
12 The doors weren't locked. No other family or friends or
13 anybody who knew Mr. Reller was brought in by the plaintiff.

14 But Mr. Mudry came in to tell you what
15 Mr. Reller said before he filed the lawsuit, and he said
16 that he couldn't believe these kinds of lawsuits, the
17 damages were way too high, and that people should take
18 personal responsibility.

19 Personal responsibility. That doesn't
20 mean saying I'm ashamed, I'm sorry or I'm embarrassed or
21 I'm stupid. Nobody in this courtroom came in and called
22 Mr. Reller stupid. He had every right to smoke; he didn't
23 have to quit, that was his decision; he was an adult from
24 the moment he started smoking the Philip Morris product,
25 he was 25 years old; he had every right to do that.

26 And he's certainly not stupid. In fact, he's
27 quite the opposite. He's a very intelligent man, successful
28 in his business, worked hard. No one has called Mr. Reller
10213

1 stupid.

2 But when Mr. Reller says people should have

3 taken person responsibility, that means not blaming others
4 for your choices. That's what personal responsibility is.

5 So when he filed the lawsuit and comes into
6 the courtroom and says it's Philip Morris's fault because
7 he smoked, then yes, we'll take issue with the claims and
8 whether that's personal responsibility.

9 The question here is: Was it Philip Morris's
10 fault that he smoked? The claims are fancy, and we'll go
11 through them; there's a verdict form that you'll get from
12 her Honor, and you'll get instructions.

13 And I just want to show you, let me turn this
14 on for a minute, generally what the verdict form looks like,
15 the things you'll be deciding.

16 Here's the first one. They're labeled at
17 the top for you. This first one is called "Design Defect,"
18 and you're going to be asked to answer questions, I'll
19 go through these with you in a little more detail, but
20 they're based on the instructions, and you can get back
21 to the instructions to find out how her Honor has defined
22 some of these elements. And for his particular one, Design
23 Defect, the major question right there is: "Was there a
24 defect in the design?"

25 Every witness who came in here told you
26 that cigarettes are inherently dangerous. Dr. Burns
27 did, Dr. Farone, Dr. Lewis, Dr. Kassman. There's nothing
28 defective in the particular design of Marlboro cigarettes

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1 or Benson & Hedges. Cigarettes are inherently dangerous.

2 So the first question on that is: "Was there
3 a defect in design?" But there's four questions you have
4 to answer for that one claim.

5 The next claim is called "Failure to Warn,"
6 and it's a form of product defect, but it's just based on
7 did Mr. Reller -- excuse me: "Was there a defect resulting
8 from a failure to warn occurring after January 1964, when
9 plaintiff switched to defendant's product, and before July
10 1st, 1969?"

11 Because he didn't smoke our product; remember?
12 He smoked American Tobacco Pall Malls from 1955 until 1964.

13 Well, right here, what did we just learn?
14 Mr. Reller was warned in January of 1964. It doesn't
15 have to be a warning on a package, it doesn't have to
16 be a warning from Philip Morris. He did get a warning in
17 1964, and he chose to only switch to a filtered cigarette.
18 That was his decision. But there was no failure to warn
19 Mr. Reller.

20 Here, you'll see there are other questions
21 that you have to answer, four questions to make that
22 determination. The third one is just another form of
23 product -- sorry. There we go. Another form of product
24 defect, which is called "Negligent Design." Was Philip
25 Morris negligent? I want to stop there because there's
26 only two questions there.

27 Remember this? The burden of proof? Every
28 single witness who came here and appeared, who knew anything

10215

1 about Philip Morris's attempts to make a safer cigarette,
2 including Dr. Farone, said Philip Morris tried to make a
3 safer cigarette. Everybody. There's no evidence on the
4 other side that they didn't try and make a safer cigarette.

5 We put up this chart for Dr. Farone, and he
6 said -- this is Exhibit 95 -- all of these initiatives were
7 underway before he even started working there. Dr. Kassman

8 told you that because he had started to work at Philip
9 Morris before Dr. Farone. All of those programs: "Safer
10 cigarette initiatives already in use or in development
11 before Dr. Farone arrived at Philip Morris."

12 That can't be negligence.

13 Now, you heard some testimony from Dr. Kassman
14 that they tried real hard, it wasn't always successful,
15 but the carbon filter program? Remember? He spent seven
16 years of his career on that program. He wrote that report
17 that you saw, that very extensive report about selective
18 filtration, and he published articles in journals,
19 peer-reviewed journals.

20 That's not negligence. It didn't work,
21 because it's very complicated, as he told you, to take out
22 individual constituents. But this list of programs shows
23 that Philip Morris was working very hard to make a safer
24 cigarette.

25 Dr. Kassman told you about his efforts from
26 1972 to about 1989 when he went over to Europe; and then
27 Dr. Lewis took the stand, and she told you about all the
28 things she had done, along with a lot of her peers, from
10216

1 1984, when she joined the company, until today.

2 The Accord cigarette, you may not remember
3 this, but Jerry Whidby -- we read that little bit of
4 testimony right at the very end when we rested, Dr. Whidby
5 said Philip Morris, as of last year, when he testified, had
6 spent over half a billion dollars on the Accord cigarette
7 alone.

8 It's still hard to do, and as I was kind
9 of joking with Dr. Lewis, and she admonished me, that
10 contraption in the Accord cigarette, a lot of technology
11 in there, a lot of patents. It still doesn't work
12 perfectly, because not all smokers like it, they don't
13 want to carry around a battery and a charger and all the
14 other things, a cleaner that you need.

15 But that's not negligence. That was an
16 extraordinary effort to make a safer cigarette. And not
17 just because Dr. Lewis and others have devoted their careers
18 to it, and they want to succeed, but it's also in Philip
19 Morris's interest. Can you imagine if they could develop
20 a truly safer cigarette, that tasted good and people wanted
21 to buy? Right? Because Dr. Benowitz told us consumer
22 acceptability matters; you know, it doesn't do any good
23 to design a safer cigarette if nobody smokes it.

24 But if they could design a truly safer
25 cigarette? Everybody would buy it. They would make
26 lots and lots of money, and they would do a good thing.

27 So all the incentives were there. They worked
28 very hard to try to make a safer cigarette, and they're
10217

1 still doing it today. There's no evidence in this record
2 of negligence.

3 Now, the next series in the verdict form
4 you're going to have to answer, the first one starts with
5 "Intentional Misrepresentation." This one has quite a few
6 questions. You see the first two there? Up to Question
7 5. And this has eight questions. As we go through the
8 evidence, I'm going to focus you on these questions. I'm
9 going to try to focus you on these questions.

10 What's the first one? "Did the plaintiff
11 act in reliance upon the truth of the representation?"

12 So no matter what you believe about the

13 representation, he has to have relied on it. That's
14 Mr. Reller, the plaintiff in this case. And her Honor
15 gave you instructions on what "reliance" means. Here
16 it is. I'm going to show it right to you.

17 And this applies for the next claim you
18 have to answer, which is concealment, another version
19 of this. Mr. Reller must establish reliance upon the
20 representation or concealment; that is, the representation
21 or the concealment must have caused Mr. Reller's conduct,
22 in this case smoking, and without such representation or
23 concealment, Mr. Reller would not have engaged in that
24 conduct.

25 So two tests: It has to have caused him to
26 do it. Here's the Frank Statement, for example. What if
27 he read the Frank Statement and he went out and he bought
28 cigarettes? Maybe you could argue that that caused it.

10218

1 No evidence of that in this case. None.

2 Not just did it have to cause his smoking,
3 but he also has to prove that without such representation,
4 he wouldn't have engaged in that conduct.

5 In 1964 when he started smoking Philip
6 Morris's product, he was already smoking, and according
7 to all the experts he was already addicted because of Brown
8 & Williamson and American Tobacco's products. So nothing
9 Philip Morris said would have changed whether he smoked
10 unless he wanted to stop.

11 We know that he had other warnings and he
12 didn't change his conduct. So the evidence here doesn't
13 prove that without such representation or concealment
14 Mr. Reller would have not engaged in that conduct.

15 Conduct also has to have substantially
16 influenced him even though there can be other influences.
17 So, I assume maybe some of you think, you know what, maybe
18 you heard something? It has to have substantially impacted
19 him and influenced him.

20 In the opening, remember I talked to you
21 about what I -- what we thought the substantial influences
22 were? And that we'll go back over them? They came from
23 Mr. Reller, what was important to him in deciding to smoke
24 and continue smoking, and none of those had anything to do
25 with Philip Morris.

26 But here is something that applies to almost
27 all the evidence in this case: Mr. Reller must not only
28 act in reliance on it, meaning, this statement, but must

10219

1 be justified in that reliance, that is, it was reasonable,
2 in light of the circumstances and Mr. Reller's intelligence,
3 experience and knowledge, to accept the representation
4 without making any independent inquiry or investigation.

5 What are the facts? Mr. Reller was an
6 intelligent guy, and in 1964 he was warned by the Surgeon
7 General. So he was on notice that cigarettes were bad
8 for him.

9 How could it be reasonable for him, in light
10 of his experience, his intelligence and his knowledge --
11 this is a sophisticated businessman, he wasn't somebody
12 who was under-educated or has been living under a rock
13 and not reading newspapers and watching TV and interacting
14 with other people; in his experience, his knowledge and
15 his intelligence, it makes no sense to rely on those
16 representations without doing any other investigation.

17 But you know what? He didn't have to do that.

18 Because nowhere did you see any evidence that any position
19 put out by Philip Morris or the Tobacco Institute was ever
20 out there all by itself. Right? You didn't see one news
21 piece that just talked about what Philip Morris's position
22 was, except for maybe those clips you saw from Mr. Bowling
23 and Mr. Wakeham from 1976. Remember that? With the British
24 interviewer? We saw them yesterday. No evidence those
25 were ever shown here in the United States or that Mr. Reller
26 ever saw them or heard them. None in the record.

27 Other than that, every piece of information
28 that was out there, if it included the tobacco industry's
10220

1 position at all, it included the health warnings, the
2 Surgeon General's position, the American Cancer Society's
3 position.

4 You saw Dr. Schaller, he put up article after
5 article. There was never an article that just said here's
6 the Tobacco Institute's position.

7 So for Mr. Reller to be credible, you have
8 to believe that he heard the tobacco company's position
9 and never heard the other side of the debate. Never.

10 There's no evidence in the record that
11 that could have happened. Because every time smoking is
12 discussed in the public, the dangers are in every article
13 and in every newspaper magazine.

14 I want to show you an example.

15 Remember that before -- during I think it
16 was Dr. Schaller's testimony, Mr. Gardner showed a lot
17 of clips, and there's one clip from 1979 by Max Robinson,
18 a broadcaster with ABC News, and it talks about the 1979
19 Surgeon General's report, the dangers to women, and the
20 dangers of lung cancer associated with smoking, and
21 at the very end it talks about the Tobacco Institute.

22 So even if what the story is true, that
23 somehow he heard the Tobacco Institute's position, which
24 isn't captured in this clip, as you can see, it just says
25 they dispute it, but you would have had to hear the rest of
26 the story. You couldn't say you were totally unaware of the
27 dangers because the first minute and a half of the story
28 talk about the dangers of smoking.

10221

1 Take a look and see when you hear the Tobacco
2 Institute's position.

3
4 (Video-tape presentation was played
5 to the jury and reported, as follows:)

7 A new cancer report by the Surgeon
8 General's Office shows lung cancer striking
9 American women in increasing numbers. For a
10 look at why, here's Ron Miller.

11 Women have generally refused to join the
12 increasing number of men who quit smoking. The
13 American Cancer Society is now aiming anti-smoking
14 campaigns directly at women.

15 "Give it up, because smoking stinks."

16 But there's more than cosmetics involved,
17 according to the study by the Cancer Society.
18 It says that by 1983, lung cancer will kill more
19 women than breast cancer. The women's death rate
20 for lung cancer is now three times higher than 1964.
21 Experts contend that women are now paying the price
22 for the heavier smoking they became involved in

23 during the 1940s.

24 The death rates in lung cancer in women are
25 now following exactly the same curve that occurred
26 in men except they're lagging behind about 25 or
27 30 years.

28 The Tobacco Institute says there's no proof

10222 1 that the 263 percent increase in lung cancer among
2 women during the past 25 years is tied directly to
3 smoking.

4 Ron Miller, ABC News Chicago.

5
6 (End of video-tape presentation)

7
8 MS. WILKINSON: So there it was, the last little
9 snippet talking about the Tobacco Institute. That was
10 after at least ten mentions of lung cancer associated with
11 smoking. So, for anyone to even hear what the tobacco
12 industry's position was, which wasn't publicized very often,
13 they had to hear about the dangers of smoking.

14 So when you look at the instruction, again,
15 on reliance, the question, did he rely on it? Did it
16 substantially influence him? And was he justified in light
17 of his circumstances, his intelligence, his experience, and
18 his knowledge?

19 That's not just in the instructions, but you
20 actually have to answer that question on the verdict form.

21 Here it is. We were looking at the potential
22 misrepresentations. See Question 6? Did he act in reliance
23 upon the truth of the representation? And Question 7: Was
24 plaintiff justified in relying upon the representation?

25 Justified. You go back to that definition we
26 were just talking about. Was he justified in relying on
27 any representation he claims that he heard.

28 And then: Was plaintiff injured or damaged

10223 1 as a result of his reliance upon the truth of the
2 representation? Talking about cause again, was this a
3 substantial factor in what caused him to get lung cancer?

4 There's no dispute he has an injury and has
5 damage. That's lung cancer. No dispute about that.
6 In fact, we didn't dispute the medical costs, and that's
7 why. You didn't hear any debate here about how much money
8 Mr. Reller -- what the medical costs were for Mr. Reller,
9 because that's not an issue in dispute. \$309,000 and
10 change.

11 The question is, is he entitled to money in
12 this lawsuit because Philip Morris somehow caused him to
13 smoke. And not just somehow, but, based on the questions
14 you have to answer, was he justified in relying on any
15 representation, did it cause him any harm, and did he act
16 in reliance on it.

17 The next claim you have to answer is Claim
18 No. 5, and that's concealment. So, instead of some
19 affirmative statement, was there something that was kept
20 from him before July 1st, 1969 that would have made a
21 difference.

22 Well, you know, in 1964 when he first
23 started smoking Philip Morris, he was told by the Surgeon
24 General: Smoking causes lung cancer in men. Chemicals, the
25 constituents, the harmful carcinogens that were in smoking,
26 Philip Morris documented in a memo in I think it was 1959,
27 those were all turned over to the Surgeon General in 1964.

28 Those weren't secrets. Not that Mr. Reller

10224

1 would have cared what the particular constituent was, the
2 point is, did he know that smoking had risks? And he did.
3 There wasn't any fact concealed from him about that.

4 Question 3: "Was plaintiff aware of the fact
5 at the time he acted?" He knew smoking was dangerous in
6 1964 from the Surgeon General.

7 And then you have to answer two more questions:
8 "Would plaintiff have acted as he did if he had known of
9 the concealed or suppressed fact?"

10 That really goes back to the testimony of
11 Dr. Benowitz; right? Because we're talking about before
12 1969? And he said that even though Mr. Reller had been
13 warned, he wasn't motivated to quit from 1964 to 1972.
14 There's no dispute about it. So his own expert said he
15 was warned.

16 There's no dispute. It didn't do any good.
17 So if he had gotten some other warning from Philip Morris,
18 would he have acted any differently? No.

19 And Question 5: "Was plaintiff injured or
20 damaged as a result of the defendant's concealment or
21 suppression of the fact?"

22 All those questions have to be answered for
23 concealment.

24 Now, Special Verdict No. 7 is what's called
25 "Negligent Misrepresentation." It's the same type of
26 claim as intentional misrepresentation, but it has to --
27 it applies under the definition of negligence.

28 Three questions there. Three more. Again,

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1 reliance is a key question in most of these: "Did plaintiff
2 act in reliance upon the truth of the representation?"

3 Then two more questions. Same elements: Was
4 plaintiff justified in relying upon the representation, and
5 was he injured as a result -- not just injured because he
6 smoked, but because of his reliance upon the truth of the
7 representation.

8 At the very beginning, you all told me smoking
9 causes lung cancer. We said we're not going to dispute that
10 smoking causes lung cancer, that it's dangerous, that it's
11 addictive. The questions you have to answer on this verdict
12 form aren't is smoking dangerous, is it addictive, it's
13 whether something Philip Morris did caused Mr. Reller to
14 smoke, he relied on that, and his reliance on something
15 Philip Morris said or did caused his injury.

16 Now, there's one other question on the verdict
17 form, I want you to see everything you have to answer,
18 it's called "Medical Causation." "Was plaintiff's smoking
19 of cigarettes a substantial factor in bringing about his
20 injury?"

21 That is just the question of was it smoking
22 that caused his injury. It's not an element of any of these
23 claims, it's a separate question you're being asked, and
24 I'll talk about it with you later.

25 So you have, not counting that, since that's
26 not a claim, you're going to have to answer a variety of
27 claims -- excuse me, a variety of questions on six different
28 claims. To prevail on any one of those claims, Mr. Reller

10226

1 has to prove every element. Not just did Philip Morris make
2 a statement that Mr. Reller didn't think was true, but did
3 he rely on it, was it justified, and did his reliance cause

4 him injury.

5 It depends on how you think about those kind
6 of things. For me, it's kind of like links. I wear this
7 bracelet throughout trial. All these links, you have to
8 have all of them to make a bracelet. If you don't have one,
9 it doesn't go around my wrist, you don't complete the chain.
10 If you're somebody with more of an engineering background,
11 you might like the bridge analogy. Put all the planks in,
12 you're missing that foot plank, you don't have a bridge.

13 Mr. Reller has to prove each and every element
14 of his claim to prevail. He can't just prove some of them,
15 but he has to prove all of them.

16 Most of the discussion that you heard yesterday
17 and this morning was about the first few elements: What
18 were the representations, were they true or not.

19 In the 1950s, as Dr. Doll told us, the
20 epidemiology was new, it had never been used to prove
21 cause before. There's a dispute about when it was really
22 resolved. But you know what, here in the United States
23 the Surgeon General told us when it was resolved.

24 Here's the cover of the Surgeon General's
25 report, and we had two quotes: 1964, the Surgeon General
26 himself said, and the committee reporting to him:

27 "Few medical questions have stirred
28 such public interest or created more scientific

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1 debate than the tobacco-health controversy.
2 The interrelationships of smoking and health are
3 undoubtedly complex. The subject does not lend
4 itself to easy answers. Nevertheless, it has
5 been increasingly apparent that answers must be
6 found."

7 And on Page 20, they talked about how they
8 resolved the debate on causation:

9 "That statistical methods cannot establish
10 proof of a causal relationship in an association."

11 Skipping down to here:

12 "To judge or evaluate the causal
13 significance of the association between the
14 attribute or the agent and the disease, or
15 effect upon health, a number of criteria must
16 be utilized, no one of which is an all-sufficient
17 basis for judgment."

18 So we have at the evidence. In 1964 the
19 Surgeon General said this had been a controversy, and they
20 were resolving it by defining cause in a different way, by
21 making a judgment. That was when they told the American
22 public that smoking caused lung cancer in men.

23 During Mr. Piuze's closing he suggested that
24 that phrase, "psychological crutch," was our word. Do
25 you remember that?

26 That's not right. Smoking and Health, the
27 Surgeon General's report, 1964, written and published before
28 Mr. Weissman wrote that memo, take a look at Page 355. The

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1 whole report is in evidence. Look what it says:

2 "The drive to use tobacco being fundamentally
3 psychogenic in origin has the same basis as other
4 drug habits, and in a large fraction the American
5 population appears to satisfy the total need of
6 the individual for a psychological crutch."

7 The Surgeon General used that term to talk
8 about why people use cigarettes and, as he said, other drug

9 habits. Not a Philip Morris word, not a tobacco industry
10 phrase, but a phrase from the Surgeon General.

11 In 1964, when the Surgeon General issued his
12 report, as Dr. Cummings admitted, it was a seminal report.
13 I'm not sure I understood when Dr. Schaller was up here and
14 there was cross-examination about how really big was the
15 story, remember those books, and was it in one of the books
16 and not in the other books?

17 Dr. Burns came in and said it was a very
18 important report, Dr. Cummings called it seminal, all of
19 our witnesses said it was essential.

20 But you know what, it doesn't matter in this
21 case because Mr. Reller heard about it. So whether it got
22 loads of publicity or some publicity, we know Mr. Reller
23 heard about it.

24 And in 1964, the report and the publicity
25 surrounding it didn't say filters will make cigarettes safe.
26 There is no testimony in the record, contrary to what you
27 heard yesterday, that somebody told Mr. Reller filters were
28 safe.

10229

1 Remember there was a clip that you saw from
2 the 1964 NBC report, and it talked about the major findings
3 of the Surgeon General's report? Let's look at it and see
4 if there's anything in there about filters or if it just
5 focuses on lung cancer.

6
7 (Video-tape presentation was played
8 to the jury and reported, as follows:)

9
10 In another special report, NBC News
11 presents: Smoking and Health.

12 The background and detailing of the
13 report issued today by the United States Surgeon
14 General's Advisory Committee on Smoking and Health.
15 Brought to you by Alka Seltzer. For effective
16 speedy relief of headache and upset stomach. And
17 by 1-A-Day brand multiple vitamins. The label with
18 the big red 1.

19 Now, here's NBC News correspond Frank McGee.

20 This book containing 387 carefully-worded
21 pages is a federal government report. It's titled
22 "Smoking and Health, a Report of the Advisory
23 Committee to the Surgeon General of the Public
24 Health Service." It was released at noon today
25 and it says:

26 "In view of the continuing and mounting
27 evidence from many sources, it is the judgment of
28 the committee that cigarette smoking contributes

10230
1 substantially to mortality from certain specific
2 diseases and to the overall death rate."

3 That is the basic conclusion. The report
4 says a great deal more and it leaves a lot unsaid,
5 but its key points are these:

6 Item: Cigarette smoking is causally related
7 to lung cancer in men. In comparison to non-smokers,
8 average male smokers of cigarettes have approximately
9 a nine- to tenfold risk of developing lung cancer and
10 heavy smokers at least a twentyfold risk;

11 Item: Cigarette smoking is the most important
12 of the causes of bronchitis in the United States
13 today, and increases the risk of dying from chronic

14 bronchitis and emphysema;
15 Item: It is established that male cigarette
16 smokers have a higher death rate from coronary
17 artery diseases than nonsmoking males;

18 Item: Higher mortality of cigarette smokers
19 is associated with many other cardiovascular
20 diseases, including miscellaneous circulatory
21 diseases, other heart diseases, hypertensive heart
22 disease, and general arteriosclerosis;

23 Item: Pipe smoking appears to be causally
24 related to lip cancer;

25 Item. Cigarette smoking is a significant
26 factor in the causation of cancer of the larynx.

27 Now, the things left unsaid: The report does
28 not say what it is in the tobacco smoke that causes

10231 lung cancer. It does not say that there is a proven
1 causal link between smoking and heart disease. In
2 other words, the conclusions regarding heart disease
3 are reached by statistical evidence.

4 Nevertheless, the report is an indictment of
5 cigarette smoking and will doubtlessly have an effect
6 on the tobacco industry and on those persons who now
7 smoke.

8 The report was handed to reporters at the
9 State Department auditorium where President Kennedy
10 is to hold his television news conference at 9:30
11 this morning. They were locked in there to study
12 the report.

13 At 11:00 a news conference was started with
14 U.S. Surgeon General Luther L. Carey giving the
15 opening statement.

16 (End of video-tape presentation)

17 THE COURT: We're going to keep going a little
18 longer, folks. I have a meeting that I need to go to from
19 12:00 to 1:00. So if you don't mind, we're going to hang
20 in here for another 15 minutes. Then that doesn't give us
21 quite as long on the other end.

22 Keep on going, please. Thanks.

23 MS. WILKINSON: So the news coverage said, what
24 everybody from the witness stand said: That smoking was
10232 causally related to lung cancer in men. It just as might

1 as well said: Smoking causes lung cancer in Mr. Reller.
2 He was a 25-year-old male at the time.

3 Nowhere in that news piece did you see anything
4 about filters. And, in fact, when Dr. Schaller took the
5 stand, he showed you two articles that specifically rejected
6 the idea that filters were safe.

7 Here's the Miami Herald, Exhibit 305. Remember
8 when Mr. Reller was in Miami at the time the Surgeon
9 General's report came out? And this is the Sunday edition.
10 Dr. Schaller was right, the story -- the report was released
11 on a Saturday, and it got massive news coverage on a
12 Sunday -- let me put up the report -- which is when most
13 people read the paper, and, in fact, Mr. Reller said he'd
14 often read the weekend paper, he and Mrs. Reller subscribed
15 here in Los Angeles to the L.A. Times on the weekends.

16 So there it is, January 12th, "Sunless Sunday."
17 Can you see that? I guess they weren't having great weather
18 down in Miami. But the point is, here's the front page

19 article of the Miami Herald talking about -- whoops -- there
20 it is: "That's it! Cigarettes Guilty."

21 You heard Frank McGee say it was an indictment
22 of cigarette smoking. None of the news coverage was saying,
23 you know, it's not that bad, just take the tar out.
24 Nowhere.

25 And if you look through the article, here's
26 what's revealed, here are the highlights: "Cigarette
27 smoking is a health hazard of sufficient importance in
28 the United States to warrant appropriate remedial action";
10233

1 "Cigarette smoking is causally related to lung
2 cancer in men; the magnitude of the effect of cigarette
3 smoking far outweighs all other factors;

4 The data about women: "In comparison with
5 non-smokers, the average male smokers of cigarettes have
6 approximately a nine- to 19 -- is that a 19? It's hard to
7 read. Nine to ten? -- a tenfold risk of developing lung
8 cancer, and heavy smokers at least a twentyfold risk."
9 Same type of statements that you heard in the Frank McGee
10 story.

11 But here's what else the Miami Herald said:

12 "Filters, pipes and cigars. Dr. James M.
13 Hundley, Assistant United States Surgeon General,
14 who served as vice-chairman of the committee, said
15 in reply to news conference questions that, quote,
16 the committee found no evidence to establish that
17 filters have any effect whatever in reducing the
18 health hazards of smoking.'"

19 So nobody was out there saying filters are good
20 for you. There's been no evidence here that Philip Morris
21 or anybody else said filters are good for you. Mr. Reller
22 made his decision and he decided to switch. He didn't want
23 to quit.

24 Same thing with -- remember Time Magazine that
25 came out the week after? The story was important enough
26 that Time Magazine, which is only a weekly magazine, came
27 out January 17th, talked again about -- here they're showing
28 the Surgeon General talking about the report. Right here:
10234

1 "There is not yet enough evidence to show
2 whether filtered cigarettes are really safer than
3 straights. Quitting smoking definitely helps."

4 Nothing about filters being good for you.

5 Now, Dr. Burns testified that after the 1964
6 report, despite the fact that people were addicted to
7 cigarettes, millions of people quit smoking. The smoking
8 rates went down.

9 Remember that chart he had, that in 1954 the
10 rates had gone up and down, there were little blips, but
11 basically from 1964 until today the smoking rates have been
12 reduced dramatically, especially here in California, from
13 40 percent to 14 to 18 percent today. He said specifically
14 many people. After the Surgeon General's report, quit
15 smoking.

16 Mr. Reller made his choice. He decided not
17 to quit.

18 And Non-profit agencies like the American
19 Cancer Society -- or organizations, it's not an agency --
20 started to put information out about the dangers of smoking.

21 We heard about not just the government, but
22 remember Mr. Reller -- the story is that Mr. Reller didn't
23 believe the government, he believed big business. Well, it

24 wasn't just the government that was saying smoking was bad.
25 However, the Surgeon General of the United States, last
26 time I checked, regardless of Vietnam and Watergate, people
27 didn't disbelieve the Surgeon General because of that. They
28 disbelieved some other people in the government, but I don't
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1 think they were disbelieving the Surgeon General of the
2 United States.

3 Regardless, there were many other people,
4 no association with the government, organizations like
5 the American Cancer Society, one of the most highly-regarded
6 sources of public health information in the world, and what
7 did they say: After the report came out, Congress decided
8 they would tell everyone, or mandate how everyone would be
9 told about the dangers of smoking. 1966, Congress said you
10 have to put this warning on: "Caution: Cigarette smoking
11 may be hazardous to your health."

12 So Mr. Reller was warned in 1964 when the
13 Surgeon General's report came out. He was warned again in
14 1966, and warned again in 1969 when further warnings were
15 put on the package.

16 But in this announcement from the American
17 Cancer Society: "Congress has acted. The next step is
18 yours."

19 And it really goes back to what Dr. Sreenivasan
20 said. You can't make someone want to quit. You can't make
21 someone believe that it's good for them. You can warn them
22 of the risk, and then it's up to them.

23 Mr. Reller was warned of the risk of smoking.
24 He was warned by the Surgeon General, he was warned by the
25 warnings on every single package of cigarettes. Maybe he
26 chose, as he said, to read some and not pay much attention.
27 But you know, we don't make people believe things in this
28 country. We give them the information. Well, he got the
10236

1 information. He chose to ignore it.

2 His wife said in 1985 she showed him the
3 warning that said smoking caused lung cancer. And he
4 chose to ignore it.

5 When you look at the story of Mr. Reller's
6 statement, and you look at the evidence, there are
7 fundamental disputes between what he says and what the
8 evidence was.

9 Here's his story: "Philip Morris is
10 responsible for Mr. Reller's smoking." That's what he says.

11 Mr. Mudry said they discussed smoking and
12 smokers' lawsuits. They agreed that it was amazing that
13 people didn't take responsibility for their actions.

14 That was Mr. Mudry's testimony here in front
15 of you. There's a cite, you can see it right down at the
16 bottom.

17 Before Mr. Reller filed this lawsuit, before
18 he had the financial disputes Mr. Mudry was talking to you
19 about and the bankruptcy, this is what he thought about
20 who was responsible: The individual was responsible.

21 Here's the story: Mr. Reller said he heard
22 the tobacco industry statements when he decided to start
23 and continue smoking. All right? That's the story.

24 The evidence in this case is that in 1955 he
25 started smoking Pall Mall cigarettes because his friends
26 were doing it, and he heard no industry statements.

27 The evidence is, he switched to Marlboros in
28 1964 when he heard about the Surgeon General's report. No

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1 industry statements caused him to switch to Marlboros.
2 In 1972 he switched to Benson & Hedges Menthol,
3 says Mrs. Reller is the reason. Well, her cigarettes were
4 in the house. He also said he wanted to try something new.
5 He specifically told Mr. Piuze, when asked, it wasn't
6 because of advertising. No tobacco industry statements
7 caused him to switch to Benson & Hedges Menthol. So the
8 story and the evidence are in dispute.

9 Here's the story: Mr. Reller didn't want to
10 smoke. He was too addicted. He couldn't quit. He told
11 us in his deposition he enjoyed smoking.

12 And Mr. Mudry told you: "I asked him
13 specifically, that I remember, once. He said he enjoyed
14 it."

15 That's not surprising. Many of us who engage
16 in things that maybe are not always so good for us, we do
17 it because we like to. Maybe we have a drink, or more than
18 one, eat foods that are bad for us, do other things that
19 are even riskier. We do them because we decide either
20 we're not going to be the one, or because we enjoy it and
21 we decide, you know what, we'll take our chances.

22 Mr. Reller enjoyed smoking.

23 Remember when Dr. Schaller showed you the
24 common knowledge chart to talk about how did we figure
25 out how people know things?

26 All of you told us when you got selected for
27 the jury that you knew that smoking was dangerous. You had
28 different times in your lives when you learned it; some of
10238

1 you -- I don't want to focus on people of different ages,
2 but some people knew it in the sixties, some people knew it
3 in the seventies, in the eighties, and very few of you could
4 remember how you knew it, because it is one those facts,
5 as Dr. Schaller said, that's so well embedded in American
6 culture, it's hard to point to: Did your mom tell you,
7 did you learn it in school, did you see one of these public
8 service announcements. But every single one of you said
9 you knew it.

10 Mr. Reller is asking you to believe that he is
11 different from every single one of you and everyone who's
12 come into this courtroom. Not a single person took that
13 witness stand and said I didn't know smoking could cause
14 cancer. And, in fact, even the experts for Mr. Reller
15 said no one's ever come in to them and said I didn't think
16 smoking was harmful.

17 Dr. Sreenivasan told you she never had someone
18 say to her, even the schizophrenics that she treats and
19 other people who have real mental deficiencies, they don't
20 come in and tell her I don't think smoking is harmful. No
21 one stepped into this courtroom to say that other than
22 Mr. Reller.

23 And the reason he has to say that is, under
24 the verdict form and the law, if he knew that smoking was
25 dangerous and he made his decision to do it, and he didn't
26 rely on our statements, then he doesn't get a dime. So
27 he wants you to believe that he is different from everyone
28 you know, from everything you told us, and from every
10239

1 witness who got on the stand.

2 THE COURT: Is this a good stopping place?

3 MS. WILKINSON: Yes. Thank you, your Honor.

4 THE COURT: All right. Ladies and Gentlemen, you're

5 admonished that it is your duty not to converse among
6 yourselves or with anyone else on any subject connected with
7 this trial or to form or express any opinion thereon until
8 the cause is finally submitted to you.

9 I'll see you folks at 10:30. 1030. And we
10 will be going until 12:00 today. So back at 10:30.

11
12 (Recess taken)

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10240

1 CASE NUMBER: BC261796
2 CASE NAME: RELLER vs. PHILIP MORRIS
3 LOS ANGELES, CA WEDNESDAY, JULY 23, 2003
4 DEPARTMENT 324 HON. VICTORIA G. CHANEY, JUDGE
5 TIME: 10:34 A.M.
6 REPORTER: TIMOTHY J. McCOY, CSR NO. 4745
7 APPEARANCES: (AS HERETOFORE NOTED)
8 * * *

9
10 (The proceedings resumed in open court,
11 in the presence of the jury, as follows:)

12
13 THE COURTROOM ASSISTANT: Remain seated, come to
14 order. Court is again in session.

15 THE COURT: In the matter of Reller versus Philip
16 Morris, BC261796. The record should reflect that all
17 12 jurors, the four alternates are present. All counsel
18 previously stated are present. Dr. Lewis is present.

19 Ms. Wilkinson, you're back on.

20 MS. WILKINSON: Thank you, your Honor.

21 When we broke we were talking about common
22 knowledge and how you make that determination. I think,
23 Thanks to the miracles of Jamil, I can show you
24 Dr. Schaller's common knowledge chart. And Dr. Schaller
25 told us that all of these different things contribute to
26 the common knowledge: Whether it's the education system,
27 mass media, our family, government, word of mouth, popular
28 culture or voluntary groups and public health organizations.

10241

1 Only one of those is the government.
2 So Mr. Reller had all these different other sources of
3 information to learn about the dangers of smoking. And
4 Dr. Schaller showed you all the different information that
5 Mr. Reller had.

6 Now, Mr. Reller also told us about many of the
7 things that influenced him, and we have put together some of
8 his testimony and some of the information to show you what
9 actually created his knowledge about the dangers of smoking.

(Video-tape presentation was played to the jury and reported, as follows:)

"We were riding to work in his car, which wasn't normal, my car must have been getting in, having service on, and we were driving along on a freeway in Miami, Florida, having a conversation, and in the middle of the conversation my father reached in his shirt pocket, took a package of cigarettes that was in his shirt pocket, crushed them, threw them out the window, and then threw the cigarette that was lit in the ashtray out the window, and threw the cigarette that what was in his mouth out the window, and said: 'That's it.'

"I was surprised, I said, 'What do you mean that's it?'

"He said, 'I promised myself that if I ever found myself having a cigarette lit, burning,

and going to light another one, I would quit smoking.' And he quit.

"Over the course of time starting roughly 1970s and ending in November of the year 2000, did your wife's attempts to get to you stop smoking, you told us cured the body, cleansed the body over a period of time, did that include other issues that she raised with you?

"Yes, it did.

"What?

"She started to voice concerns about our health and smoking, and it was an additional incentive for her to want to quit smoking and for her to want me to quit smoking."

(End of video-tape presentation)

MS. WILKINSON: So what we heard is the evidence from Mr. Reller himself, first in 1962, his own father quit, a man that was a role model to him, a man who had a drinking problem like him and then quit, smoked like he did, and at 47 years old his father stopped smoking.

His wife warns him about the dangers of; smoking, not just as you heard from him, about cleansing the body, but she came in here and told you that she actually tried to get him to go to quit programs, and that she showed him the warning in 1985 that smoking caused lung cancer;

43 The education system. Let's look at what he says about that and his track coach.

(Video-tape presentation was played to the jury and reported as follows:)

"Mr. Reller, tell us the words, to the best of your recollection, that were stated, either to you individually or to a group of athletes by the coaches, as far as smoking was concerned.

"That smoking would reduce our lung capacity, our endurance capacity, and that it was not appropriate to be smoking and

15 to be on the team."

16
17 (End of video-tape presentation)

18
19 MS. WILKINSON: So when he was in high school his
20 track coach told him that it limited his lung capacity.

21 What about mass media? The Miami Herald that
22 we showed you, just an example of all the media coverage
23 that was within Mr. Reller's world in Miami, Florida, at
24 the time that he heard about the Surgeon General's report.
25 He told you that he couldn't remember specifically how he
26 heard about it, so we brought in all the different ways he
27 could have heard about it: the newspaper, the television,
28 and other people talking about it. You heard Dr. Burns

10244 say that it was highly publicized at the time.

1 say that it was highly publicized at the time.

2 Word of mouth from friends, co-workers, slang.

3 Well, we've heard "coffin nails" and other slang terms

4 Dr. Schaller told us about. But he talked to Mr. Mudry
5 about personal responsibility.

6 Popular culture: Entertainment, songs or
7 movies. And in Mr. Reller's world, remember the Superman
8 movie in 1978?

9

10 (Video-tape presentation was played
11 to the jury and reported, as follows:)

12
13 Sorry to drop in on you like this
14 Miss Lane, but I've been thinking. You know,
15 there must be a lot of questions about me that
16 people in the world would like to know the
17 answers.

18 Of course. Yes.

19 You really shouldn't smoke, you know,
20 Miss Lane.

21 Don't tell me. Lung cancer, right?

22 Well, not yet, thank goodness.

23 Um, would you like a glass of wine?

24 No. No thanks. I never drink when I fly.

25

26 (End of video-tape presentation)

27

28 In 1978, Mr. Reller, Mrs. Reller went to

10245

1 movies, they told us -- I think Mrs. Reller told us that's
2 one of the things they liked to do. There was another movie
3 that Mr. Piuze showed during cross-examination, another
4 Superman movie, remember that, with the Marlboro truck?

5 And this clearly is telling anyone who
6 watches that smoking causes lung cancer, with a little bit
7 of humor and his X-ray vision, but anybody watching that, as
8 Dr. Schaller would say, associates that, because you hear it
9 out in the world, and the movie is just reinforcing what you
10 already know.

11 Governments. Local, state and federal. What
12 was Mr. Reller exposed to?

13

14 (Video-tape presentation was played
15 to the jury and reported, as follows:)

16

17 "It's also true that not only were you
18 aware of the Surgeon General's report, but you
19 acted on it; correct? You took action based upon

20 what you understood of the Surgeon General's report
21 in 1964; true?

22 "True.

23 "Okay. Sometime during your testimony
24 yesterday you mentioned the fact that you were
25 aware that at sometime you were aware of warnings
26 that came out on the packs of cigarettes.

27 "Yes.

28 "Well, there were certainly other warnings

10246 that were on every pack; right?

2 "Yes.

3 "You read the warnings, did you not?

4 "Initially, yes.

5 "And the warnings were on every pack of
6 cigarettes that you ever consumed after 1966;
7 correct?

8 "I don't know what date they started to
9 be on. Whatever date that was."

10 (End of video-tape presentation)

13 MS. WILKINSON: We've talked about this. Mr. Reller,
14 you just heard him say, he relied on the Surgeon General's
15 report.

16 Element in the claims: What did Mr. Reller
17 rely on to make his decisions about smoking? He didn't
18 say he relied on something Philip Morris said. He said
19 he relied on the Surgeon General's report.

20 Voluntary groups and public organizations.
21 What did Mr. Reller have access to, here and in Miami?

23 (Video-tape presentation was played
24 to the jury and reported, as follows:)

26 "The next time you attempted to quit,
27 according to your testimony, is when you
28 went to the Seventh-Day Adventist program?

10247 "That's correct.

2 "You took that attempt and that program
3 seriously, I take it?

4 "Yes.

5 "You attended all five days?

6 "I don't remember how many days it was.
7 If that was the length of time, I attended all
8 the days.

9 "You paid attention during all the sessions?

10 "Yes.

11 "And if there was a film that described a
12 lung cancer or demonstrated a lung cancer surgery,
13 you would have watched that film; correct?

14 "Yes.

15 "And in that, you would have been made aware
16 of the dangers of smoking; correct?

17 "If that film was shown, yes."

19 (End of video-tape presentation)

21 MS. WILKINSON: That's just one example.

22 Dr. Schaller told us that he had gone to
23 Loma Linda and looked through the Seventh-Day Adventist
24 historical material, there were films shown, pamphlets

25 handed out, all talking about the dangers of smoking.
26 And, of course, that makes sense. That's
27 common sense. You go to a church program, and I believe it
28 was free, I don't believe that Seventh-Day Adventist program
10248

1 cost a thousand dollars, the church put it on for people to
2 encourage them to quit, and part of the way they encourage
3 people to quit, as Dr. Schaller said, is they showed a very
4 gruesome lung surgery so that people would really see,
5 visualize what could happen to them. Mr. Reller had access
6 to that. He attended the Seventh-Day Adventist program.

7 These are all just examples of all the
8 different ways Mr. Reller was exposed to the dangers of
9 smoking. Yet he tells you he never heard anything about it.

10 There is an instruction that's another very
11 simple one her Honor read, it's on Page 20 here, and I want
12 to show it to you. Right there in the middle: "You should
13 use your common sense."

14 When you came into this courtroom, you told
15 us that you knew about the dangers of smoking. That they
16 were well known. That's your common sense. Don't leave
17 that outside the jury room when you go back there to
18 deliberate about this case. Test the evidence in this
19 case against your common sense and what you know.

20 You're also, according to the instructions,
21 allowed to test what the witnesses tell you. You're
22 supposed to judge their credibility based on all different
23 kinds of things: how they look, how they respond to
24 questions -- look, obviously not how they physically look,
25 but if they look elusive or if they're candidly answering
26 questions, quality, the demeanor and manner her Honor told
27 you, the existence or nonexistence of bias, or interests
28 or other motive, if they make inconsistent statements.

10249

1 But there's a specific instruction about
2 someone who doesn't testify truthfully, and it says:

3 "A witness, who is willfully false in one
4 material part of his or her testimony, is to be
5 distrusted in others. You may reject the whole
6 testimony of a witness who willfully has testified
7 falsely as to a material point, unless, from all
8 the evidence, you believe the probability of truth
9 favors his or her testimony in other particulars."

10 That's for you to decide. But there was a
11 series of questions of Mr. Reller about what he believed
12 about the dangers of smoking, and he didn't say I believed
13 the government -- excuse me, corporations over the
14 government.

15 He was asked if he knew anything about the
16 dangers of smoking, and if you could play that, that's
17 his testimony about whether he even knew there was a
18 possibility of smoking causing lung cancer.

19
20 (Video-tape presentation was played
21 to the jury and reported, as follows:)

22
23 "And prior to 2000, November of 2000, when
24 you quit, and I use that term just to -- shorthand
25 for the description you've just given us, where you
26 stopped smoking perhaps is a better way of saying
27 it, you did not believe that smoking caused lung
28 cancer; right?

10250

1 "That's correct.
2 "You were 61 years old at the time.
3 "Yes.
4 "You had been smoking for almost 45 years.
5 "Yes.
6 "You had certainly heard of lung cancer;
7 right?
8 "Yes.
9 "So that when you were diagnosed, it wasn't
10 the first time anyone said the words 'lung cancer'
11 to you; right? I mean, it was a disease.
12 "Yes.
13 "You knew it was a disease back in the
14 eighties; right?
15 "Yes.
16 "You knew it was a back in the 1970s?
17 "Yes.
18 "In the 1960s?
19 "I don't know that I thought about it in
20 the sixties.
21 "You knew at least -- let's go back, then,
22 to the seventies. At that time you knew that
23 Americans were dying of lung cancer in those
24 years; right?
25 "Yes.
26 "But before your diagnosis you didn't even
27 think there was a possibility that cigarette smoking
28 could have caused lung cancer. Is that what you're

10251

saying?

2 "That's right."

3 (End of video-tape presentation)

4

5 MS. WILKINSON: Not even a possibility in November
6 of 2000.

7 But then I asked him about heart disease.

8 And here's what he said:

9

10 (Video-tape presentation was played
11 to the jury and reported, as follows:)

12

13 "You didn't think there was a possibility
14 that smoking could cause heart disease?

15 "No, I thought it could cause heart disease.

16 "When did you learn that smoking could cause
17 heart disease?

18 "Oh, I thought it could cause heart disease.

19 "When did you think -- when did you have the
20 idea that it could?

21 "I don't remember when I got the idea.

22 "But at some point you understood that there
23 was a risk that smoking could cause heart disease.

24 "Yes.

25 "Despite that, you didn't stop smoking;
26 correct?

27 "Correct.

10252

1 "Did you believe at some point that smoking
2 could cause bronchitis? Prior to your diagnosis
3 in 2000?

4 "I never thought about it.

5 "You told us that you believed at some

6 point it could cause heart disease, but you didn't
7 believe it could cause lung cancer until 2000;
8 right?

9 "That's correct."

10
11 (End of video-tape presentation)

12
13 MS. WILKINSON: So Mr. Reller's story, his testimony,
14 the evidence is that he thought that smoking could cause
15 heart disease, a risk, it can be terminal to people, but
16 he didn't even think there was a possibility that it could
17 cause lung cancer.

18 You might remember the Gallup polls. You know
19 what? There were questions about -- there was two different
20 issues. The Gallup Poll from 1990, this is Exhibit 240.
21 Let me see if I have that. No, next, 245.4.1.

22 Next page, please. You know what, let's lose
23 this. It's easier just to see this. Let's switch to this
24 screen. There it is. This is Gallup Poll, public opinion
25 in 1990, in evidence as 240.

26 Here are the questions that were asked of the
27 public in 1990: "Do you think that cigarette smoking is
28 or is not harmful to your health?" 96 percent of Americans

10253

1 agreed they believed it was harmful.

2 You heard from Dr. Cummings, that's an
3 overwhelming amount in a poll. You have some statistical
4 difference, only three percent said not harmful, and one
5 had no opinion.

6 And then they broke it down to heart disease
7 and lung cancer. And look at the numbers:

8 "What is your opinion; do you think cigarette
9 smoking is one of the causes of heart disease?" 85 percent
10 of Americans thought it was, 9 percent said no, and 6
11 percent said no opinion.

12 When asked about lung cancer, 94 percent said
13 yes, 4 percent said no, and 2 percent had no opinion.

14 So, more people in America know that smoking
15 is associated with lung cancer than heart disease. Because
16 that's the message, right, the Surgeon General has been
17 saying since 1964? Repeatedly. In the public health
18 community and the non-profit organizations.

19 But here, Mr. Reller -- and I don't know what
20 difference it would make, once you know it causes heart
21 disease you're on notice that it's a dangerous product --
22 but he wants you to believe that he's in this 85 percent
23 that knows it causes heart disease, but he's not in this
24 94 percent that thinks it causes lung cancer. And I assume
25 that if he's in the 85 percent that knows it causes heart
26 disease, he's in the 96 percent that says it's harmful.
27 Because heart disease isn't a good thing.

28 Yesterday you heard a claim that he didn't

10254

1 fear cigarettes. Now, I don't remember Mr. Reller --
2 I don't know that there's evidence in the record that
3 Mr. Reller said he didn't fear cigarettes. You can go
4 back and see if it's there. But he acknowledges, by saying
5 it causes heart disease and that he saw the warnings, that
6 he did know it was dangerous. And he wasn't any different
7 from you and the people who have taken the witness stand
8 and the people here who responded to the Gallup Poll.

9 Here's another poll, Exhibit 329. This is
10 polling results comparing '85 and '90, and two different

11 polls. The first one in '85 was a government poll that
12 says: "Do you think cigarette smoking definitely or
13 probably increases a person's chances of getting lung
14 cancer?"

15 95 percent said yes, responded yes. There
16 it is.

17 In 1990, the poll we just read: "How many
18 people think that smoking is one of the causes of lung
19 cancer?" 94 percent. And no matter how the question was
20 asked, at least 94 percent of all Americans associated
21 smoking with lung cancer in 1985 or 1990.

22 There was a large amount of media out there,
23 not just in 1964, but until today. 16.14, please. This
24 is a summary, a demonstrative to show you all the different
25 news sources that Mr. Reller would have had access to to
26 learn about the risks and dangers of smoking.

27 But his story is, on 16.33, that he had no
28 idea. The evidence is this: The Surgeon General's report
10255

1 in 1964; the warnings on the package in 1966; the new
2 warnings on the cigarette packs in 1969; the marinara
3 sauce incident where he, on his own, associated something
4 unhealthy, vomiting what he thought was blood, with smoking;
5 1976, attending the Seventh-Day Adventist program; 1985,
6 Mrs. Reller warns him that smoking causes lung cancer; 1993
7 to 2000, he discusses the warnings with Mr. Mudry and smoker
8 lawsuits; and 1964 through 2000, common knowledge that we
9 just established, the overwhelming information in the public
10 about the dangers of smoking.

11 As another reason, I guess, to show that
12 even if he might have known he couldn't stop, even though
13 he had 36 years and he claims he had not one piece of
14 information about the dangers of smoking, it was suggested
15 that Mr. Reller couldn't quit smoking.

16 Now, I think everybody in this courtroom
17 agreed that Mr. Reller was addicted to cigarettes. Under
18 Dr. Benowitz's theory, almost everybody who smokes
19 is addicted because he says if you smoke five or more
20 cigarettes, you're addicted. But as Dr. Sreenivasan told
21 you, that's not the question. The question is, can someone
22 quit.

23 Dr. Burns told you that 50 million Americans
24 have quit smoking. You assume most of those are addicted
25 smokers, under Dr. Benowitz's theory. That means somewhere
26 near 50 million addicted smokers quit smoking.

27 Some of those people probably don't
28 smoke a lot, some of those people are heavy smokers.
10256

1 Dr. Sreenivasan and others told you that how much people
2 smoke, and Dr. Domino said the same thing, is not a
3 predictor of how successful they will be in quitting,
4 because motivation, not number of cigarettes, is the most
5 important factor.

6 So determining that Mr. Reller was addicted
7 doesn't tell us whether he could have quit. And quitting
8 matters in this case. It matters for two reasons: One,
9 because if Mr. Reller had quit when he was warned in 1964,
10 Dr. Burns told you he probably would have never gotten lung
11 cancer. The evidence he had in his own family showed that.
12 His father quit at 47, much older than Mr. Reller was in
13 1964, and his father lived to 82 years old. Quitting
14 matters.

15 But it also matters because the question

16 is, did Philip Morris do something that made him not stop
17 smoking; that made him continue to smoke?

18 Well, Dr. Benowitz admitted that there's
19 nicotine in all cigarettes, and it didn't matter whether
20 Mr. Reller was smoking Marlboro, American, Benson & Hedges
21 or Virginia Slims, they all have nicotine, and the factors
22 he was telling you about, the dopamine release, that happens
23 to almost everybody that smokes. So that us doesn't tell
24 you whether somebody can quit.

25 The question is, what was the evidence about
26 Mr. Reller and whether he tried to quit, whether he was
27 just so addicted he couldn't quit.

28 Well, in 1955 when he started smoking, he was
10257

1 smoking Pall Malls. Dr. Burns and others said -- I think
2 it was Dr. Burns, maybe it was Dr. Benowitz, Dr. Benowitz
3 said that Mr. Reller was addicted by the time he became a
4 regular smoker, which was around the time he was 18, while
5 he was smoking Pall Mall, the American Tobacco brand.

6 But Dr. Benowitz said Mr. Reller only made
7 two quit attempts in 45 years. Two that were 24 hours in
8 length.

9 The story, though, and let's look at 1638, is
10 that Mr. Reller tried to quit smoking several times, but
11 he couldn't. The evidence is his own testimony that he
12 was going through the motions to make his wife happy. She
13 wanted him to quit, and you heard that if both people don't
14 quit, Dr. Sreenivasan told you, it's almost impossible if
15 you're not both making the effort, if you're sitting around
16 another smoker, it's just like if you're an alcoholic, if
17 you're drinking around another alcoholic, it's very hard
18 to stop.

19 Dr. Benowitz said he only had two quit
20 attempts in 45 years, and Dr. Sreenivasan agreed with that.

21 We talked already about precontemplation and
22 the different stages, but there's no evidence in the record
23 that any of the warnings that Mr. Reller did get made any
24 difference.

25 And in the elements, in the questions you had
26 to answer when we were talking about reliance, the question
27 is: Would he have done anything different had he known the
28 information? Well, let's just assume that if Philip Morris
10258

1 had sent him a notice and said: You know what, like it says
2 on the packages, and like it said in the Surgeon General's
3 report, cigarettes are addictive, cigarettes are dangerous,
4 would it have made any difference to Mr. Reller?

5 Dr. Benowitz said no, he was warned and it
6 didn't make any difference to him.

7 So to rely on it, to make that decision in
8 accordance with the instructions you have, he would have
9 to have shown you that he would have actually acted totally
10 different had he received any additional information from
11 Philip Morris.

12 And after 1969, the judge read you instructions
13 saying that you can't hold Philip Morris liable for any
14 failure to warn. Here's the instruction. Here we go.

15 Let's look at Page 7, the instruction.

16 First of all, this part says:

17 "You can't find Philip Morris liable for
18 Mr. Reller's injury, nor can you punish Philip
19 Morris solely because Philip Morris makes,
20 advertises and sells cigarettes."

21 But here, the instruction says:
22 "The United States Congress has
23 mandated that all cigarette packages and
24 advertisements contain warnings. The exact
25 wording of the warnings has been decided
26 upon by Congress. You may not hold Philip
27 Morris liable for failure to warn before
28 January 1964," when Mr. Reller started
10259

1 smoking Philip Morris, "and after July
2 1st, 1969."

3 So when you heard Mr. Piuze talking about
4 the Philip Morris website, 2000 website, and Philip Morris
5 said they agreed with the overwhelming consensus that
6 cigarette smoking is addictive, and that cigarette smoking
7 caused disease, including lung cancer, and his rhetorical
8 question about why didn't they warn them sooner, why didn't
9 they say anything sooner? They didn't have to. Those
10 warnings were on the package. And after 1969 there was no
11 duty to warn. You can't find them liable for a failure to
12 warn after July 1969.

13 Can we have Demonstrative 16.38, please.

14 We were talking about Dr. Sreenivasan and
15 quitting, and we had a board that she used for -- you can
16 take that down. Thanks.

17 Mr. Gardner, I may need your help just to hold
18 this up over here. Just put it on the table.

19 I tried to make it big enough so you could see
20 it from there. Closer? There we go.

21 Now, this is just a picture used to show you
22 the events in Mr. Reller's life related to smoking; what
23 things he knew, what things -- what decisions he made,
24 what choices he made:

25 In 1955, Mr. Reller started to smoke
26 Pall Mall cigarettes;

27 In 1962, he saw his father quit smoking;

28 In 1964, he heard about the Surgeon General's
10260

1 report. Right then he stopped and he made a decision.
2 He could have decided to quit, as the Surgeon General
3 recommended, but he decided to switch and to continue
4 smoking;

5 In 1966, first time the warnings were on
6 the package, he stopped. He could have taken heed of
7 the warnings. He chose to continue smoking;

8 1969, a new warning, a stronger warning.

9 He said he remembers the early warnings. He continued
10 to smoke;

11 1972, he thought smoking was harming him.

12 He stopped for two days. He continued to smoke;

13 1973, he switched to a different cigarette.

14 He could have stopped and quit smoking;

15 In 1976 he was successful for five days,
16 perhaps three weeks. Remember there was a different
17 recollection, which I think as the instructions tell you
18 is common sometimes, this was an event a long time ago and
19 Mr. Reller remembers five days, Mrs. Reller remembers three
20 weeks. Assume for this that it's three weeks. He quit for
21 three weeks. He could have stopped;

22 And in 1985 when his wife warned him, showed
23 him the warning that smoking caused lung cancer, he could
24 have stopped again;

25 From 1976 to 2000 there, see that blank

26 space on the board? He didn't make any quit attempts.
27 Dr. Benowitz told us that people have to try sometimes
28 multiple times. As some of you know, it's hard to quit
10261

1 smoking. For some people it's very hard, for some people
2 it's not as hard. But you can't do it if you don't try.
3 And Mr. Reller didn't try from 1976 to 2000. His expert
4 doesn't disagree with that, and Dr. Sreenivasan agrees
5 with that.

6 These were the things that Mr. Reller did
7 and the choices that he made in his life. No one is saying
8 he didn't have the right to make those choices. He did.
9 He had the right to continue smoking, he had the right
10 to ignore the warnings, but that was his decision.

11 None of these events, when you look back at
12 them and look at the evidence, had anything to do with
13 Philip Morris.

14 Now, at the end of that verdict form, I showed
15 you that separate question on: Was smoking a substantial
16 cause or factor, let's take a look at that again, of
17 Mr. Reller's smoking. This is separate from the claims.

18 Here we go. Here it is. It's called "Medical
19 Causation." In this case, Mr. Reller had the burden to
20 prove that smoking was a substantial factor in bringing
21 about his injury. It doesn't answer the claims because,
22 as we said, even if you believe smoking caused his cancer,
23 that doesn't answer completely any of the claims that you're
24 asked to answer. So that's why it's a separate question.

25 But the evidence in this case wasn't so
26 clear. When I got up in opening statement, we talked about
27 causation and I said I'm not sure what the evidence will
28 prove.

10262

1 You saw the evidence, and what happened was
2 when Mr. Reller was first diagnosed in November of 2000,
3 remember, they thought he had mesothelioma. That's what
4 all those pathology reports said. So, mesothelioma,
5 according to all the experts, or "mesothelioma" depending
6 on how you pronounce it, is a cancer that's normally only
7 caused by asbestos, and that's why his doctors started
8 to do more tests, asked him questions about his asbestos
9 exposure.

10 That's not something Philip Morris did to
11 raise doubt. That's in the medical records. His own
12 doctors initially diagnosed him with mesothelioma.

13 Then they decided it was adenocarcinoma.
14 Until we came to trial, Dr. Hammar hadn't testified, he
15 didn't have -- Mr. Gardner, you heard, took the deposition
16 the night before he testified? And then he told him he
17 was a hundred percent sure it was a very rare cancer called
18 pseudomeso -- or pseudomesotheliomatous adenocarcinoma.

19 This cancer is so rare, there's only 160
20 reported cases in the world. Dr. Hammar, one of the
21 world-renowned experts on that kind of cancer.

22 So everybody else who testified in this case,
23 nobody else diagnosed him with pseudomesotheliomatous
24 adenocarcinoma. All the other people, Dr. Rubin,
25 Dr. Qasabian, very good doctors, took good care of
26 Mr. Reller, extended his life long beyond what they had
27 predicted. But they're not experts in pathology, and
28 they certainly didn't come in and say they know he had
10263

1 pseudomesotheliomatous adenocarcinoma.

2 Dr. Burns came in and gave his opinion.
3 But you know what he said? "I would rely on Dr. Hammar."
4 Dr. Hammar is the only one who diagnosed him
5 with a subset of adenocarcinoma of pseudomesotheliomatous
6 adenocarcinoma.

7 Why does that matter? In this case why does
8 that matter? Well, first, it's very, very rare. Second of
9 all, there's very little data, but, most importantly, every
10 time Dr. Hammar has written about that disease, and he's one
11 of the few people that's written about it, he didn't call it
12 a smoking-related disease, he called it an asbestos-related
13 disease.

14 He wrote a book -- or excuse me, an article
15 for the United States and Canadian Academy of Pathology,
16 and what does he say about it? "A rare" -- whoops. Oh,
17 you're going to show it for me? Thank you. He knows
18 I'm not very good with this thing. Sorry about that.

19 It's little. Yeah, can you blow it up?

20 All right. This is what Dr. Hammar wrote
21 to other medical experts. Not for purposes of testifying
22 in a case against Philip Morris; right? When he's
23 writing to other scientists, what does he say? "A rare
24 asbestos-related malignancy readily acceptable," and he
25 goes on to say "from mesothelioma."

26 That matters, remember, because he said the
27 reason it's called pseudomeso or "pseudomezo" is because
28 it mimics mesothelioma? So it all makes sense now.

10264

1 The reasons the doctors initially diagnosed him with
2 mesothelioma is this looks like that. So, he made a
3 mistake, but it's totally understandable.

4 He comes in and says, no, it's this very
5 rare form adenocarcinoma, and it's related to asbestos.

6 Mr. Gardner put up all his other writings
7 he's ever done. Never says it's a smoking-related disease.

8 Let's look at another one, Exhibit 52, and he's
9 talking about his colleagues and Dr. Koss: "A significant
10 percentage of these neoplasms occur in individuals who were
11 exposed to asbestos and who have elevated concentrations
12 of asbestos in their lung tissue."

13 Doesn't say anything about smoking.

14 Mr. Gardner put up every writing that
15 Dr. Hammar has ever done outside of this courtroom, never
16 once did he call it a smoking-related cancer. He says
17 it's an asbestos-related cancer.

18 Now, then he says, well, you know what? I
19 think it's caused by smoking. So we asked him: Well,
20 then, you know, you have all these writings, you don't call
21 it outside this courtroom a smoking- or asbestos-related
22 cancer, you called it an asbestos-related cancer.

23 He said: Well, I brought that up to Mr. Piuze,
24 I told him to look into it, and he said he never did any
25 of the other tests he could do to determine whether there
26 were elevated concentrations of asbestos in their lung
27 tissue.

28 Let's look at 16.10.

10265

1 What could he have done? There's the four
2 tests that he was asked about: Ashing, he didn't do it;
3 digesting, he didn't do it; iron stain, didn't complete
4 the test; fiber burden analysis, he didn't do it.

5 All of those are tests -- one he didn't
6 prefer as much, I think the ashing is something he doesn't

7 like to do, but all of those other tests he could have done,
8 he's done before, and they would have answered that question
9 if there was elevated tissue in Mr. Reller's lungs.

10 The other witnesses all said they didn't
11 look -- excuse me. Dr. Hammar also said he personally
12 didn't look at Mr. Reller's asbestos exposure. He couldn't
13 tell you whether there was an accepted level or a predictive
14 legal of exposure in this kind of cancer because it's so
15 rare.

16 Let's look at 16.9.

17 What could he have looked at? Mr. Reller's
18 clinical history. Dr. Hammar did not review it;
19 Mr. Reller's deposition, which you heard parts of, where
20 he talked about the asbestos in the building where he worked
21 at 8447 Wilshire Boulevard, Dr. Hammar didn't review that;
22 Mrs. Reller's deposition, and she also came into court after
23 him, so that's why we put up the deposition, she told you
24 that she was so concerned about asbestos in the building
25 that she went to the manager and she said, you know what,
26 you're not using professionals, you're just using the
27 regular guys who work in the building, you should be using
28 people who know how to remove asbestos. And the manager

10266

1 told her, oh, don't worry about it, even though there's
2 a warning down in the building about the asbestos, that
3 California recognizes that as a cause of cancer. She was
4 so worried she asked Mr. Reller to move out of the building.
5 Dr. Hammar didn't consider that;

6 Mr. Reller's sons' depositions talking about
7 asbestos, didn't read that; and the plaintiff had hired
8 an asbestos expert, filed an affidavit in this case.
9 Dr. Hammar said: I didn't look at any of the actual
10 evidence on asbestos exposure.

11 I'm just telling you, I don't think it's
12 sufficient, but I don't know what it is.

13 The other witnesses? Same thing.

14 Let's look at 16.41.

15 The story? That the plaintiff's experts
16 examined the asbestos exposure? Here's what they actually
17 said. This is the testified that you heard. Dr. Burns
18 was asked:

19 "So, speaking of the exposure side,
20 you have never looked at the actual evidence
21 in this case of Mr. Reller's exposure to
22 asbestos?

23 "That's correct."

24 Dr. Hammar, talking about how you might want
25 to evaluate it. He was asked:

26 "And after you made that suggestion,"
27 meaning to Mr. Piuze, "you still never looked
28 at any asbestos exposure for Mr. Reller, did

10267

1 you?

2 "I did not.

3 "You were not provided with any
4 information?

5 "That's correct."

6 The tissue sample was available, he didn't
7 look at it, he didn't do the tests, and he didn't look
8 at asbestos exposure.

9 You know what? There's a specific instruction
10 on this kind of evidence. It's called weaker and less
11 satisfactory evidence. Here's what it says:

12 "If weaker and less satisfactory evidence
13 is offered by a party, when it was within that
14 party's ability to produce stronger and more
15 satisfactory evidence, the evidence offered
16 should be viewed with distrust."

17 It was within the plaintiff's ability to
18 produce stronger evidence. He had the world's expert on
19 pseudomesotheliomatous adenocarcinoma. He had the tissue,
20 the expert knew how to do the tests, he had an asbestos
21 affidavit, he had testimony about asbestos exposure, he
22 could have easily looked at that and come in this courtroom
23 and told you: You know what, no asbestos in his lung
24 tissue, the asbestos exposure wasn't sufficient, and we
25 wouldn't have any dispute.

26 Philip Morris has said from the beginning of
27 this case smoking can cause lung cancer. That's not what
28 this issue is about. The issue is he has a rare, rare form
10268

1 of cancer, that Dr. Hammar says outside of this courtroom
2 when he writes to other scientists is an asbestos cancer,
3 not a smoking cancer. To prove that this was not an
4 asbestos cancer, the sole fact, we don't know whether it
5 was substantial or not because he didn't do these tests.
6 He didn't do the tests, and he didn't look at the actual
7 exposure.

8 How can he get on the witness stand, as all
9 these witnesses, and say: Oh, I'm sure the exposure wasn't
10 enough. I didn't look at it, but I'm sure it wasn't?

11 The judge said to you that when you hear
12 opinion testimony, if you don't think the underlying facts
13 have either been proven or are reliable, you can discount
14 it.

15 I suggest to you that it was very easy for
16 those experts to look at the actual exposure and to do these
17 tests, and they didn't do it, and that testimony should be
18 viewed with distrust about what caused Mr. Reller's cancer
19 when he had a rare cancer called pseudomesotheliomatous
20 adenocarcinoma.

21 In the instructions on this issue, and on every
22 issue except for one part of product defect, Mr. Reller
23 has the burden of proof. We didn't bring any experts in on
24 what caused Mr. Reller's cancer. As I said, Dr. Hammar just
25 announced the day before that he was 100 percent sure it was
26 pseudomesotheliomatous adenocarcinoma. It was Mr. Reller's
27 burden to establish all the facts.

28 Okay. Here's the burden of proof:
10269

1 "Mr. Reller is seeking damages based
2 on claims of fraud, negligence and defective
3 product. Mr. Reller has the burden of proving
4 by a preponderance of the evidence all of the
5 facts necessary to establish the essential
6 elements of each separate claim."

7 He could have done so under the weaker evidence
8 instruction. He chose not to. And you should consider that
9 evidence with distrust.

10 But that claim is separate, or that element
11 that you have to decide on the verdict form is separate
12 from the rest of the things you have to decide. And
13 for now I want to go back and talk about design defect.
14 Let's look at what you have to answer again.

15 I know when you go back there, one of the
16 things first you're going to do is look at the instructions

17 and look at the questions. When we started this case,
18 we told you there were two questions that would be very
19 important: Did Mr. Reller, hear, see or read anything
20 that Philip Morris said, and did he rely on that; was it
21 a substantial influence in any of his decisions?

22 And those are the questions we asked
23 all the experts and the witnesses, and as you remember,
24 nobody had any information on that other than Mr. Reller.
25 Dr. Benowitz, he interviewed him for 30 minutes and talked
26 about his addiction. But other than Mrs. Reller, no one
27 else came in and talked about anything Mr. Reller heard,
28 saw or relied on.

10270

1 Those issues, and we'll get back to them in
2 a minute, cover most of the claims you're going to have
3 to decide. But the product defect claims are separate,
4 so I want to focus on those for a little while.

5 This design defect starts with the basic
6 question: What is the defect in the design? And if you
7 go to the instructions -- if I can find mine here. I'm
8 missing Page 8.

9 Mr. Gardner, do you have Page 8 of the
10 instructions? Thanks.

11 So there's the Question 1: What is the defect
12 in design? And her Honor gave you, and you'll get when you
13 go back there, this section on product liability, and here,
14 the first one they're talking about, the failure to warn,
15 which we've already talked about. Excuse me. I'm sorry.
16 That's the next one.

17 This is design defect. And here are the things
18 that the plaintiff has to prove: That we manufactured
19 the cigarette. There's no dispute about that, we did.
20 The product possessed a defect in its design. That's the
21 dispute.

22 Mr. Reller didn't identify a particular defect
23 in any cigarette. Cigarettes are inherently dangerous,
24 they can cause cancer, but his expert said all cigarettes
25 do that. Not just the Marlboro cigarette or the Benson &
26 Hedges, but all cigarettes do that.

27 And, in fact, even the Cambridge cigarette,
28 which was the one that Dr. Farone said he thought was safer,
10271

1 he can't prove that it's safer, and every other witness who
2 came up and testified after him said they didn't think that
3 that cigarette was safer. And people who testified before
4 him, there's testimony of Dr. Burns and Dr. Benowitz, who
5 both specifically say that the Cambridge cigarette is not
6 safer.

7 Let's take a look at 16.37, if we could.

8 Under the product defect claim, you're going
9 to have to decide the question is: Did the plaintiff prove
10 there was a safer alternative? A different design. If he
11 does, then the burden shifts to us. But if he doesn't, you
12 don't have to go any further.

13 So the story you heard was that there was a
14 safer cigarette. What did we hear from everybody in the
15 case? Dr. Kassman: There is no safer cigarette. He hopes
16 so, he thought so, but he said it couldn't be proven. He
17 can't point to a safer cigarette;

18 Dr. Lewis, she told you the same thing:
19 There's no safer cigarette;

20 Dr. Burns: All cigarettes are inherently
21 dangerous;

22 Dr. Benowitz, right on point: There is no
23 cigarette design proven to be safer.

24 No evidence other than Dr. Farone's testimony.
25 And let's look at that, Page 16.4. Dr. Farone was talking
26 about Cambridge, and here's what he said. As he says for
27 design:

28 "It lacked one feature. You would have
10272

1 had to put some flavor or something in that
2 filter so that people would appreciate the
3 sensation. It had a little bit of nicotine,
4 but if you put more filter flavors in that
5 filter, even a little bit of nicotine in the
6 filter and some flavor, then people would get
7 something a little bit more."

8 So that design wasn't complete. In fact,
9 Cambridge, unfortunately, one, you couldn't prove that it
10 was safer because you had the side-stream smoke Dr. Farone
11 talked about, and you had the tar and nicotine you got
12 because of the FTC method said it was low, but he couldn't
13 say that's exactly what any individual smoker got.

14 But the bottom line is, the cigarette wasn't
15 acceptable to the consumer, and that's part of a safer
16 design. It doesn't do any good if somebody won't smoke
17 it. They didn't like the taste, it was hard to light, as
18 Dr. Kassman told you, and it tasted terrible because it
19 was mostly air.

20 So that design wasn't complete. There wasn't
21 a safer design that Dr. Farone can talk about.

22 Let's see 16.35, please. Dr. Benowitz.

23 "There's no evidence that the Cambridge
24 cigarette was a safer cigarette.

25 "Answer: Right."

26 That's not evidence from Philip Morris.
27 That's evidence from the plaintiff's own expert. Asked
28 specifically about that cigarette design, he says it's
10273

1 not safer.

2 And Dr. Farone even acknowledges: "No public
3 health organization ever endorsed Cambridge as safe or
4 safer."

5 So there's no evidence in this record, other
6 than Dr. Farone saying he thinks it is, even though it needs
7 improvement in the design, that there's a safer design
8 alternative.

9 So let's go back to the instructions, "the
10 product possessed a defect in design," and here the defect
11 is defined for you: "If it fails to perform as safely as
12 an ordinary consumer would expect when used in an intended
13 or reasonably foreseeable manner."

14 An ordinary consumer. Not Mr. Reller, but
15 the ordinary person who smokes. Did it function, perform
16 as safely as expected? Yes. Cigarettes aren't safe. It
17 functioned exactly how people think cigarettes smoke. The
18 cigarette itself functioned as one ordinary consumer would
19 expect it to.

20 "If there is a risk of danger inherent in the
21 design which outweighs the benefit." That, as it says down
22 here, the burden switches to us if you find there was a
23 defective design.

24 Philip Morris has the burden of proving that
25 the benefits of the product as a whole outweigh the danger
26 inherent in such defective design. But you have to get

27 to the fact that somebody identified a defect first. And
28 no one came into this courtroom and identified a defect.

10274

1 Even if you were to answer this question about
2 the danger inherent outweighing the benefits right here,
3 "the benefits of the product as a whole outweigh the danger
4 inherent in such defective design," think about what happens
5 if you put out a cigarette that you thought was safer but
6 you couldn't prove it. If we put out a cigarette and said,
7 you know, we think it's safer, we can't prove it, what would
8 happen?

9 Well, if it tasted good, people would probably
10 switch; right? Most people. There's a big market for it,
11 Dr. Lewis and others told us. In fact, such a big market,
12 when Premier came out, remember that story, she said Philip
13 Morris went nuts, it was made by a competing company,
14 and they wanted to be out there first and they were going
15 crazy because Reynolds had beat them to the market with
16 a cigarette -- that turned out to be a failure, but they
17 thought it might be a safer cigarette. So there was a big
18 market out there.

19 If you put a cigarette out that you thought was
20 safer, people would switch, people who were going to quit
21 might not quit, and worse, people who might not have smoked
22 at all might take it up, thinking it was safer.

23 So overall, would the dangers of the defect in
24 the product outweigh the benefits? If you can't prove the
25 cigarette's safer, you could have unintended consequences
26 of more people moving to that product. Unless -- that's why
27 the scientists came in and told you they couldn't prove it.
28 That's why Dr. Benowitz says there's no safer cigarette.

10275

1 He doesn't want people switching; he wants people to stop
2 smoking altogether.

3 If you go back to the Cambridge, the Cambridge
4 wasn't successful on the market. Let's look at 16.36,
5 please. And that, everyone said, is part of what makes
6 a safer cigarette. Because if nobody smokes it, it's not
7 safer.

8 Dr. Farone admitted: "Not many people bought
9 pack after back". In other words, people tried it once,
10 they didn't light, they didn't go back.

11 "Cambridge was not a whopping success," I
12 believe that was an understatement by Dr. Kassman, and
13 he said, "The Cambridge tasted like air."

14 You know, it's a lot like, remember, when Coke
15 decided they were going to do a New Coke? They put all that
16 money out and they advertised a New Coke? And what was it?
17 A big failure; right? Nobody liked how it tasted. So they
18 went back to Classic Coke. You can't make people change.

19 You put Ben and Jerry's Ice Cream in the
20 refrigerator/freezer compartment at the grocery store and we
21 put the low fat yogurt in, and -- well, I'm not going to say
22 because I'm not going to say what I do, but people have been
23 known to buy the Ben and Jerry's despite the fact that there
24 is low fat yogurt in there.

25 That's not to minimize cigarettes and the
26 dangers of cigarettes, but the point is, we give people
27 a choice, and part of what choice is consumer
28 acceptability: What do you like?

10276

1 There were lots of cigarettes out there. We
2 have the de-nic cigarette, and let me see if I have that,

3 which is -- can we look at Exhibit 16.55, please.

4 Remember this? Dr. Kassman said while he
5 was there they had that great technology that came from
6 General Foods where they finally could get almost all of
7 the nicotine out of cigarettes. It sounds like a great
8 idea; right? Because nicotine is what's addictive. Maybe
9 people can smoke without being addicted, or, even better,
10 not smoke.

11 Put out in the Benson & Hedges box, just what
12 Mr. Reller smoked. Nobody liked it. Not just Mr. Reller,
13 no evidence he ever, ever tried any cigarette that had lower
14 tar, no nicotine, nothing. But it wasn't just Mr. Reller;
15 all three of these brands, the Benson & Hedges, the Merit,
16 and the Next, Philip Morris put them out on the market,
17 almost nobody liked them.

18 Not surprising when you hear the testimony
19 that people smoke in large part for nicotine. That's
20 been well known since Dr. Domino and others published in
21 this book that you saw, the smoking behaviors, motives and
22 incentives; right? Not a secret, nothing Philip Morris
23 kept from anybody, published in book, and, in fact, everyone
24 said that's been known for a long time, that nicotine is
25 one of the reasons people smoke.

26 But the point is, in these cigarettes nicotine
27 was taken out, and in theory maybe they're safer, nobody can
28 say that they were, but nobody liked them. They're on the
10277

1 market with all the rest of the cigarettes, and virtually
2 nobody picked them up.

3 When you go back and you look at the defective
4 design instructions and verdict form, ask yourselves:
5 What is the particular defect that the plaintiff proved?

6 I submit to you there's no evidence that there
7 was any defect in the design of the cigarette. Or the
8 cigarettes that Mr. Reller was smoking.

9 We discussed the negligent design, and we've
10 discussed the failure to warn, but I want to go back to
11 that for when you get back into the jury room.

12 Was there a defect resulting from failure
13 to warn? The instructions there aren't the same. There
14 aren't, you know, a defect like the filter was designed the
15 wrong way. This means was the failure to warn the consumer,
16 including Mr. Reller, what caused the defect, what caused
17 him harm, and here's what the Court told you you have to
18 consider: One, Philip Morris was the manufacturer. We
19 don't dispute that;

20 The product was defective. We do dispute
21 that, and there's no evidence that there was any particular
22 defect to the Marlboros and the Benson & Hedges;

23 And that the defect was the cause of the
24 injury.

25 Now, that's a little confusing. The cigarette
26 was clearly either the cause of the injury or the asbestos
27 was the cause of the injury; right? Assuming you're
28 looking at this and you're saying the cigarette was the
10278

1 cause of the injury, that doesn't mean a defect was the
2 cause of an injury. The question is, what identifiable
3 defect did Mr. Reller present?

4 And in this case, product defect, as we've
5 already talked about, has to be a failure to warn only
6 between January 1964, when Mr. Reller switched, until
7 1969, because of the law about the warnings.

8 But as important, when you're looking at this
9 verdict form, you're not going to see anything here about
10 how you define whether Philip Morris had a duty to warn,
11 because the questions don't ask you that. But you have
12 to consider that under the instructions.

13 And look what the Court says. Philip Morris
14 had a duty to warn during that time period if: The use of
15 the product in the manner was reasonably foreseeable by the
16 manufacturer involves a substantial danger that would not
17 be readily recognizable by the ordinary consumer. Excuse
18 me, ordinary user of the product.

19 So in 1964 to 1969, again, we go back to not
20 just what Mr. Reller knew, but what the ordinary consumer
21 knew. And Dr. Schaller told you that: 1964 on, people knew
22 that smoking was dangerous. You don't have to know all the
23 details, but people knew. The ordinary user, the ordinary
24 smoker knew that smoking was dangerous.

25 When we started this case and we talked about
26 the different questions we wanted each witness to ask and
27 about whether what we did affected Mr. Reller, the case is
28 not about Philip Morris and 50 years of history, despite
10279

1 what the plaintiff did during almost the entire case where
2 most of the witnesses knew nothing about Mr. Reller. It's
3 about whether Philip Morris's conduct affected Mr. Reller.
4 And I told you that we wanted to ask whether anyone knew
5 whether what we said was heard, read or seen by Mr. Reller,
6 either directly or indirectly, and whether he relied on it.

7 We didn't make up those questions. This
8 is the question the judge has in the instruction under
9 intentional misrepresentation. One of the elements that
10 the plaintiff has to prove is that Mr. Reller must have
11 read, seen, or heard the representation directly or
12 indirectly. That is a common claim -- I mean common to
13 the claims.

14 Here it is again under negligent
15 misrepresentation. Mr. Reller has to prove that he heard,
16 read or saw the representation, directly or indirectly.

17 What is the evidence about whether Mr. Reller
18 heard, saw, or relied on anything Philip Morris said
19 directly? We asked him during his deposition specific time
20 periods about whether he heard anything from Philip Morris,
21 the tobacco industry, TIRC, CTR, and I only use the acronyms
22 because I never get council or committee right, and TI,
23 Tobacco Institute. We broke down time periods, and it
24 probably wasn't clear to you in the beginning, we started
25 in the 1950s and we went up to 1988.

26 Now you've heard the judge's instruction that
27 you can't hold Philip Morris liable for anything from '88
28 to '98, so we didn't ask him questions about that time
10280

1 period. But let's take a look about what he said about each
2 specific time period in his life. This is 16.43, please.

3
4 (Video-tape presentation was played
5 to the jury and reported, as follows:)

6
7 "QUESTION: Okay. Here's another one.
8 The TIRC, the Tobacco Industry Research Committee.
9 Did you ever hear of that?

10 "ANSWER: Huh-uh. No.

11 "QUESTION: Here's another one: The CTR,
12 or Council for Tobacco Research. Did you ever

13 hear of them?
14 "ANSWER: Not to my memory.
15 "QUESTION: Ever hear of any statements
16 that were made by either the CTR or TIRC to your
17 knowledge?
18 "ANSWER: Not to my memory.
19 "QUESTION: Have you ever read or heard
20 anything written or said by the Tobacco Institute
21 regarding smoking and health?
22 "ANSWER: Not to my memory."
23

24 (End of video-tape presentation)
25

26 MS. WILKINSON: TIRC, CTR, TI, he doesn't remember
27 ever hearing anything from any of those organizations.
28 Let's see what's next.

10281

1 (Video-tape presentation was played
2 to the jury and reported, as follows:)
3

4 "QUESTION: At the time that you started
5 smoking Pall Malls, is it true that you had
6 not heard any statement made by anybody in the
7 tobacco industry about the health effects of
8 smoking at the time that you started to smoke?

9 "ANSWER: I have no memory of hearing
10 anything."

11 (End of video-tape presentation)
12

13
14 MS. WILKINSON: That was during the time he was
15 smoking a different product, but he had never heard anything
16 at that time about smoking from the tobacco companies.

17
18 (Video-tape presentation was played
19 to the jury and reported, as follows:)
20

21 "QUESTION: And you don't recall hearing
22 any statements, specific statements from Philip
23 Morris about smoking from 1959 to 1963, do you?

24 "ANSWER: About the risks?

25 "QUESTION: Let's start with the risks.

26 About the risks.

27 "ANSWER: No.

28 "QUESTION: Or about whether smoking was

10282

1 dangerous or not?

2 "ANSWER: No."

3 (End of video-tape presentation)
4

5
6 MS. WILKINSON: That was leading right up to the
7 Surgeon General's report, he hadn't heard anything from
8 Philip Morris, directly or indirectly.

9 He doesn't have to hear -- Philip Morris
10 doesn't have to say it to him directly, he can hear it from
11 a news source that said Philip Morris said this. Either
12 way. Or TIRC or CTR or TI. So far he's saying up to 1963,
13 he never recalls hearing anything from Philip Morris or
14 any tobacco industry spokesperson.

15
16 (Video-tape presentation was played
17 to the jury and reported, as follows:)

18
19 "QUESTION: In 1964, Mr. Reller, do you
20 recall any specific statements Philip Morris
21 made about smoking and health?
22 "ANSWER: No.
23 "QUESTION: Do you recall any statements,
24 specific statements that any other tobacco company
25 made in 1964, about smoking and health?
26 "ANSWER: No."
27

28 (End of video-tape presentation)
10283

1 MS. WILKINSON: That's consistent with what he said
2 about relying on the Surgeon General's report; right? He
3 said he relied on the Surgeon General's report in 1964 to
4 switch, and he's saying at that time he didn't hear anything
5 from Philip Morris or the tobacco industry.
6

7 (Video-tape presentation was played
8 to the jury and reported, as follows:)
9

10 "QUESTION: And you can't recall any
11 specific statements that Philip Morris, as
12 a company or its executive, made during that
13 time period about the risks or the health
14 effects of smoking; correct?
15 "ANSWER: Correct.
16 "QUESTION: You cannot recall any
17 statements that any tobacco company made about
18 the possible risks or dangers of smoking from
19 1965 to 1970, can you?
20 "ANSWER: That's correct.
21 "QUESTION: Other than advertisements,
22 you don't have any specific recollection of any
23 statements Philip Morris made about smoking at
24 all during that time period, do you?
25 "ANSWER: No, I do not."
26

27 (End of video-tape presentation)
28 ///
10284

1 MS. WILKINSON: This is the time period he told
2 us that he wasn't thinking about quitting, he switched
3 to Philip Morris, going back and forth between Florida
4 and California, and then he came out to California.
5

6 (Video-tape presentation was played
7 to the jury and reported, as follows:)
8

9 "QUESTION: In 1971, you never discussed
10 with anyone the dangers or the risks of smoking;
11 right?
12 "ANSWER: That's correct. To the best of
13 my knowledge, no conversation.
14 "QUESTION: At that time you enjoyed smoking.
15 "ANSWER: Yes.
16 "QUESTION: At that time you don't recall
17 hearing any statements from Philip Morris
18 specifically about smoking; is that right?
19 "ANSWER: That's correct."
20

21 (End of video-tape presentation)
22

23 MS. WILKINSON: That's important because that's
24 the time when -- around the time he said he had quit
25 drinking, he quit using Valium, and he believed that
26 the marinara incident was related to his smoking.

27 So at that time he hadn't heard anything, he
28 says he doesn't recall hearing anything specifically, and
10285

1 we know he believed at that time smoking was dangerous
2 because he stopped smoking when he thought he was vomiting
3 blood.

4

5 (Video-tape presentation was played
6 to the jury and reported, as follows:)

7
8 "QUESTION: And during that same time
9 period, from 1973 to 1983, can you point to any
10 specific statements Philip Morris made about
11 smoking that you heard or read?

12 "ANSWER: No, I cannot."

13

14 (End of video-tape presentation)

15

16 MS. WILKINSON: 1973 to 1983, he had met his wife,
17 she had tried to get him to go to some quit programs, and
18 in 1983 he started his own business.

19 Let's see what he said from 1983 to 1988.

20

21 (Video-tape presentation was played
22 to the jury and reported, as follows:)

23
24 "QUESTION: Finally, in 1983 to 1988,
25 you don't have any specific recollection of any
26 statements Philip Morris made about smoking;
27 isn't that right?

28 "ANSWER: That's correct."

10286

1 (End of video-tape presentation)

2

3 MS. WILKINSON: 1988, up to the period where
4 Philip Morris can't be held liable for anything it said,
5 Mr. Reller has no recollection of hearing or seeing,
6 directly or indirectly, a statement from Philip Morris,
7 TIRC, CTR or TI.

8 As you saw from the jury instructions and from
9 the -- excuse me. Those are the essential elements, here's
10 the fraud instruction again: "Mr. Reller must have read,
11 seen or heard the representation, directly or indirectly."
12 He hasn't proved that he did.

13 Now, he did show quite a few Philip Morris
14 documents, and some of those documents we told you you'd see
15 the good, the bad and the ugly, and you saw them. Some of
16 them, written over a 50-year period, when we had thousands
17 and thousands of employees; some were just stupid, some
18 were great ideas -- you saw Dr. Kassman write out that long
19 report and talk about all the great things they were doing,
20 but there are some documents that were stupid, some that
21 had bad ideas, and some that were really disturbing.

22 But when you get back there, I want you to
23 remember that instruction: Were any of these statements
24 things that Mr. Reller heard or saw and relied on to make
25 his decision?

26 And I just want to give you a few examples, and
27 then I want to talk about two other issues, and we're done.

28 Or I'm done. You're not done because Mr. Piuze gets to talk

10287

1 again, because they have the burden of proof, the law says
2 he gets one more chance to talk.

3 And when he does, I hope you'll remember some
4 of the things we've been talking about because, you'll be
5 happy to hear, I don't get to get up and talk again. That's
6 the end of it.

7 But let's talk about some of the documents.
8 I want to go through a few examples.

9 Mr. Piuze showed you yesterday a document
10 on filtration. Remember the idea that -- here, it was
11 I believe a document from the 1960s that talked about
12 the illusion of filtration being as important as actually
13 filtration. Remember that?

14 I asked Dr. Farone about that when he came in,
15 because it makes no sense. Everybody, including Dr. Farone,
16 Dr. Lewis, Dr. Kassman, talked about making filters, and
17 that tar and nicotine has been decreased dramatically in
18 all cigarettes due to filters. Filters do reduce the amount
19 of tar and nicotine, according to the FTC measurement.

20 So I asked Dr. Farone specifically about that:
21 Did you just create the illusion of filters, or were you
22 actually trying to make filters work?

23 Dr. Farone, not our witness, said, of course
24 we were trying to make the filters work. He told you about,
25 remember, the laser perforation program he worked on where
26 they punched all those little holes in the paper that's
27 on the filter, and they used to punch them one way and
28 then he and the rest of his team discovered this laser

10288

1 technology, and that really helped because you got the
2 dilution and, you know, the good things that helped take
3 out a lot of the smoke and bring in a lot of the air.

4 So there was no illusion of filtration.
5 Somebody wrote that in a document, it's an unfortunate
6 thing. It was 40 years ago. I think it was written by
7 Dr. Dunn, who has not been, you know, my favorite character
8 in this -- or the favorite character in the drama, in the
9 story.

10 But it's not what happened. He may have
11 written it down that there was an illusion of filtration,
12 but Dr. Farone, Dr. Kassman, Dr. Lewis, every witness who
13 knew about what Philip Morris was doing said the filters
14 worked.

15 Dr. Benowitz, Dr. Burns, Dr. Doll all said --
16 Dr. Doll was asked specifically: Would you recommend taking
17 filters off because they don't work? And he said of course
18 not.

19 Virtually all cigarettes today have filters
20 on them.

21 What about the next document? It's another
22 Dr. Dunn document. I told you that guy was writing lots
23 of things.

24 Document No. 101. Remember this? It was
25 shown yesterday. And it had all this language about --
26 here's the document, you can see it. Excuse me. 101,
27 there's the exhibit number. "Motives and Incentives."
28 This is the paper he wrote around the time of the

10289

1 St. Martins conference. But the part that was so exciting
2 was where he talked about the cigarette being a nicotine
3 delivery device. And he starts with: "The cigarette should

4 be conceived not as a product but as a package. The product
5 is nicotine, the cigarette is but one of many package
6 layers."

7 And then he goes through in this kind of
8 flowery language, that "it's unobtrusively portable,
9 its contents are instantly accessible." You know, he
10 goes on and on, kind of talks about how it gets nicotine.

11 Remember, then we went through with
12 Dr. Benowitz, who was talking about -- we said couldn't
13 you say the same thing about a can of Coke or anything
14 that was giving somebody the substance that they wanted?
15 And he said yes.

16 But Dr. Domino told you that wasn't anything
17 anybody didn't know. People writing in that book that
18 was published, people writing before that and after that,
19 all believe that people smoke in large part to get nicotine.
20 That's in the public literature. People themselves knew
21 that. People in World War II knew it was hard to quit
22 smoking. It was no secret. It was no secret kept in that
23 document because he described it as a nicotine delivery
24 device.

25 But both of those documents, nothing to do
26 with Mr. Reller. He didn't see those, he didn't rely on
27 them, and had nothing to do with it.

28 And he certainly knew that nicotine was
10290

1 addictive. Mrs. Reller told us, that in 1994 when they saw
2 that CEO testimony in front of Congress, he didn't think
3 they were telling the truth because he knew nicotine was
4 addictive. He and Mrs. Reller knew that.

5 So that's an example of even if he had known
6 something, assume it was a secret and Philip Morris kept
7 it to itself, if he had known that would that have changed
8 his conduct? No. He said he knew it, and he still
9 continued to smoke.

10 The last group of documents are the documents
11 by Dr. Osdene where he talked about destroying documents.
12 There's nothing to say about that, and it's offensive and
13 it's disturbing.

14 But you did hear from witnesses who came
15 through there and denied that that's what happened at Philip
16 Morris. Dr. Lewis got up on the stand and she told you
17 about the procedures at Philip Morris for documenting all
18 the research in laboratory notebooks; Dr. Kassman told
19 you the same thing; and Dr. Farone did.

20 Dr. Farone, Dr. Kassman, Dr. Lewis, all
21 scientists at Philip Morris, all said they had never
22 destroyed documents, they never saw anyone destroy
23 documents, and Dr. Farone said even though he talked
24 to Dr. Osdene about it, he never saw him do it.

25 It seems bizarre that Dr. Farone started to
26 work at Philip Morris in 1976, supposedly he knew Dr. Osdene
27 was talking about destroying documents, he knew that Philip
28 Morris wasn't saying that it was proven that smoking caused
10291

1 cancer, and he didn't leave the company. He stayed.

2 If all those horrible things were really going
3 on in 1976, 1977, the first year he joined the company, why
4 in the world did he stay? He said it's because he wanted
5 to work within the system. He must have not thought it was
6 so bad that he wouldn't be able to speak his mind and make
7 changes. And because the company was devoted to making a
8 safer cigarette.

9 He said that's what they were doing before.
10 Dr. Kassman talked about it; and they brought in Dr. Lewis,
11 recruited her in 1984. He interviewed her. He didn't
12 say: This is a horrible place to work; you know, they're
13 destroying research. The most important thing to a
14 scientist, doing research, documenting your research,
15 publishing it, and he never told anybody who was
16 interviewing, coming into the company, that that was
17 happening. Because he didn't believe that it was happening.
18 And he certainly wasn't doing it, and nobody that worked
19 for him that was doing it.

20 And the evidence that you saw from Philip
21 Morris showed quite the opposite. Here's the report,
22 Exhibit No. 383, "Selective Filtration." Just one example.

23 Dr. Kassman told you that these are the type
24 of annual reports Philip Morris wrote every year; right?
25 This wasn't destroyed. And by the way, neither were the
26 Osdene notes. If they were so great at that, they kept
27 around the notes that said destroy the documents? The
28 document was produced. You all saw it.

10292

1 But here is another report. "Selective
2 Filtration, Annual Report," we went over this, written
3 by Dr. Kassman, all the different things that they did,
4 the science that they did. Their goal, objective right
5 here: "The prime objective of this project is to
6 investigate and develop selective filtration systems which
7 will remove specific components from cigarette smoke."

8 Internal document, not meant for anyone else
9 to see, devoted to removing harmful constituents.

10 The work was documented. Not only was
11 it documented, remember this? It was published. They
12 weren't destroying their research. Within the bounds
13 of, you know, company proprietary information, they were
14 competing with Reynolds. They weren't going to tell them
15 all their secrets. But they were publishing in journals
16 like the Journal for Catalysis, the Journal of Physical Chem
17 istry, read by scientists around the world. They weren't
18 destroying research, they were publishing research.

19 This evidence contradicts what Dr. Farone
20 was saying about Dr. Osdene and what those notes said.
21 So when you hear that no one came in and denied those
22 allegations, that's false. Dr. Lewis was here for that
23 reason.

24 Nobody accepts that Philip Morris didn't try
25 and make a safer cigarette, didn't do the research, and
26 didn't devote a lot of great scientists' time and money
27 to doing that.

28 The question, though, about the documents.

10293

1 We had disputes about whether they were taken in context,
2 what else was out there. You have all of that information.

3 Philip Morris in 1964 didn't accept the Surgeon
4 General's definition of causation, and they dug their heels
5 in and didn't change until 1999. That's true.

6 They didn't think that causation could be
7 proved that way. They didn't change their position, the
8 science changed. Dr. Kassman told us over time, but you
9 still couldn't tell, and you can't say today, what the
10 mechanism is, what is it in cigarette smoke that causes
11 cancer.

12 But the point is, in 1999, 2000, they have
13 their website up and they say: Smoking -- they agree with

14 the public health community. Not because the science has
15 changed, but because there should be one message, from
16 the public health community and from the tobacco company,
17 and because, you saw in 1994, no one was listening to them
18 anyway.

19 Even when there was this debate about what the
20 definition of addiction was, your common sense, everybody's
21 was, whether it's defined by the DSM as addiction or
22 dependence, we use the term "addiction." Right? It's the
23 colloquial term now. It's probably what Dr. Schaller would
24 say is in the common knowledge.

25 We say we're addicted to chocolate. I'm
26 not sure if, you know, under any kind of scientific medical
27 definition you can be addicted to chocolate, but we say
28 things like that.

10294

1 So when they got up in 1994 and they were
2 trying to have some debate, holding on to their old
3 definition, nobody was listening to them.

4 They got the message. They changed their
5 website.

6 The question, though, is, did Mr. Reller pay
7 any attention to that? He didn't pay attention to their
8 testimony in 1994. Mrs. Reller told you that. And with
9 all these other documents, the question is, did he hear
10 or see any of that, and did he rely on it?

11 You heard his testimony. Not one recollection,
12 directly or indirectly, about whether Philip Morris or any
13 tobacco industry representative, not one statement he could
14 point to that he remembers.

15 Now, the last thing I want to talk to you about
16 are damages. And I leave that last because, of course, I
17 don't think -- excuse me. The evidence does not show that
18 Mr. Reller is entitled to damages in this case, because he
19 has to prove every element of his claims to be entitled to
20 damages. You don't even get to that in the verdict form
21 if you don't find he's proved all the elements.

22 Just because the evidence doesn't warrant
23 damages doesn't mean that Mr. Reller wasn't injured, doesn't
24 mean that he doesn't have a fatal disease, and as I said to
25 you at the beginning, it doesn't mean that that's not sad
26 and he doesn't deserve sympathy, respect, understanding.

27 That's not what this case is about. No one
28 disputes that he has lung cancer.

10295

1 The question is, is there a legal basis for
2 him to obtain money for medical costs, which, again, we have
3 stipulated to, there's no dispute about that, and for what's
4 called pain and suffering.

5 You got an instruction on pain and suffering,
6 and I want to talk about it for a minute because Mr. Piuze
7 mentioned it, and he may talk about it again when he stands
8 up, I don't know, I'm not going to get the chance to. He
9 gave you a number, and I want to talk about that, but let's
10 look at the instruction first.

11 The Court says: "No definite standard
12 or method of calculation is prescribed by law
13 by which to fix reasonable compensation for pain
14 and suffering. Nor is the opinion of any witness
15 required as to the amount of such reasonable
16 compensation."

17 But here's the part I want to focus on:
18 "Further, the argument of counsel as to

19 the amount of damages is not evidence of reasonable
20 compensation. In making an award for pain and
21 suffering you should exercise your authority with
22 calm and reasonable judgment and the damages you
23 fix must be just and reasonable in the light of
24 the evidence."

25 Now, I don't think you'll -- the evidence
26 doesn't warrant that you'll get to this decision. But if
27 you do, the fact that Mr. Piuze suggested a million dollars
28 a year for Mr. Reller's pain and suffering, that's not
10296

1 evidence.

2 He said it's 16 years that Mr. Reller is
3 cutting off his life, maybe more, as we heard. That's true.
4 But Mr. Reller's father quit smoking and he lived to be 82.
5 The difference is, Mr. Reller's father quit smoking. He
6 made the choice. He had been smoking since he was 47 -- or
7 until he was 47 years old. He took responsibility. Sounds
8 like he was an addicted smoker, had been smoking two packs
9 a day. I presume it was hard for him to quit. He had also
10 been an alcoholic and he quit drinking. He added those
11 years on to his life by quitting.

12 Mr. Reller made his decision in this case.
13 No one is criticizing him for making that decision. But
14 he's responsible for that decision, just like his father
15 was responsible for his decision to quit.

16 Now, I'm going to end right at the lunch hour,
17 and when we come back Mr. Piuze is going to talk. I have no
18 idea how long he's going to talk. I have no idea what he's
19 going to say.

20 Except I do, your Honor, now that I think about
21 it, have one other chart that I want to discuss with the
22 jury that I forgot. So if I can do at that after lunch.
23 I should have never said that that was the last topic.

24 THE COURT: Yes, you can.

25 No lawyer is ever accurate about that. It's
26 amazing.

27 All right, Ladies and Gentlemen, you are
28 admonished that it is your duty not to converse among
10297

1 yourselves or with anyone else on any subject connected
2 with this trial or to form or express any opinion thereon
3 until the cause is finally submitted to you.

4 I'll see you at 1:00. Okay? 1:00. You just
5 get 15 minutes more. I'm just going to go to that meeting
6 across the way. So 1:00, folks.

7
8 (Lunch recess taken)
9 [End of A.M. Session of the transcript]
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